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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1981

NO.

J. RICHARD BARBER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state official's mere receipt of money or property from companies doing business with the state creates a presumption of compulsion which is sufficient by itself - absent a "convincing explanation" otherwise by the defendant - to meet the reasonable

doubt standard of proof for a Hobbs Act conviction for extortion under color of official right?

2. Whether a defendant, who testifies that he would have admitted certain undisputed facts if he had been asked at the beginning of the investigation, may be impeached through repeated questioning regarding his refusal, two years later, to appear before the grand jury which indicted him.

3. Whether the guilty pleas of a defendant's co-participants in an alleged scheme to defraud may be introduced at trial as substantive evidence of the defendant's guilt.

4. Whether a public official may be convicted under the mail fraud statute for depriving citizens of their right to the "honest and faithful performance of his duties",

without proof that that the alleged scheme influenced his judgment or decisions on official matters.

5. Whether a defendant, who discovers after trial that the government deliberately concealed information raising doubts about a juror's impartiality, is entitled to an evidentiary hearing to determine whether actual bias existed.

6. Whether a district court may instruct a jury, as a matter of law, that a state governmental office is an "enterprise" within the scope of the R.I.C.O. statute.

7. Where a defendant testifies under a grant of immunity and is later prosecuted by the same jurisdiction for conduct described in that testimony, whether the government's assertion that it developed its case

independently of the immunized testimony is sufficient to negate the presumption of taint.

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OPINIONS BELOW

The complete opinion of the United States Court of Appeals for the Fourth Circuit, printed in Appendix A hereto, is reported in 668 F.2d 778 (1982). The opinion of the United States District Court for the Southern District of West Virginia, filed on August 22, 1979 and printed in Appendix B hereto, which held that the office of the West Virginia Alcohol Beverage Control Commissioner could constitute an "enterprise" within the meaning of the R.I.C.O. statute (Title 18 U.S.C. section 1951), is reported in 476 F. Supp. 182 (1979).

The district court's findings of fact and conclusions of law with respect to the use immunity granted to petitioner, printed in Appendix C hereto, and the district court's findings with respect to the sufficiency of the government's proof

that it made no use of petitioner's immunized testimony in the present prosecution, printed in Appendix D hereto, were not published.

JURSIDICTION

Petitioner seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed his conviction on all twenty counts of an indictment charging him with violations of the Hobbs Act, Title 18 U.S.C. section 1951, the Racketeer Influenced and Corrupt Organizations [hereinafter referred to as "R.I.C.O."] statute, Title 18 U.S.C. section 1962(c), and the federal mail fraud statute, Title 18 U.S.C. section 1341. The judgment of the Fourth Circuit was entered on January 14, 1982. A timely petition for rehearing was denied by an order of the court, printed in Appendix G hereto, which was entered on March 19,

1982. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. section 1257.

STATUTES INVOLVED

The verbatim texts of the following statutes involved in this case are printed in Appendix F hereto: Mail Fraud, Title 18 U.S.C. section 1341; the Hobbs Act, Title 18 U.S.C. section 1951; and R.I.C.O., Title 18 U.S.C. sections 1961-1963.

STATEMENT OF THE CASE

A. The events leading to the indictment

The petitioner, J. Richard Barber, was Commissioner of the West Virginia Alcohol Beverage Control Commission from 1970 through 1976. In 1975, he was interviewed by F.B.I. agents and the then-United States Attorney for the Southern District of West Virginia, John Field, regarding his collection of

campaign contributions for Governor Arch Moore from liquor company representatives and others during the 1972 gubernatorial campaign. He later testified on the same subject before a federal grand jury which ultimately returned an indictment against Governor Moore. Both his grand jury testimony and the informal discussions with the F.B.I, and U. S. Attorney were governed by an informal grant of use immunity (App. C, pp. 69a-78a).

In December of 1976, agents of the Bureau of Alcohol, Tobacco and Firearms began an inspection of Barber's office records as part of an investigation into the expense accounts of some liquor company salesmen. During the course of their investigation, the B.A.T.F. agents apparently discussed with Barber his use of the so-called "withdrawal system", under which Barber and virtually all of his predecessors in office withdrew liquor from the state warehouse, distributed it

to various governmental offices and civic organizations, and then sent the manufacturers a form characterizing the withdrawn liquor as promotional samples and requesting that the state be credited with its purchase price.

In early 1977, Barber was succeeded in office by Patrick Boggs, who repeatedly asked the B.A.T.F. to continue its now-dormant investigation of Barber's conduct in office. Boggs also provided the B.A.T.F. agents with their first information concerning possibly illegal cash contributions made by liquor companies during Barber's tenure in office. The B.A.T.F. revived its investigation of Barber in November of 1977 and, in early 1978, turned the case over to the United States Attorney for the Southern District of West Virginia. On May 5 or 6, 1978, an F.B.I. agent assigned to the case obtained copies of two F.B.I. Form 302's which summarized Barber's

statements to the F.B.I. and U. S. Attorney during the Moore investigation, including the information that Barber had collected campaign contributions for Moore from liquor salesmen and others during the 1972 election, totaling "between $50,000 and $70,000 with 90-95% of this amount being in cash". During the next few months, these Form 302's were duplicated and distributed to virtually the entire prosecution team.

On May 3, 1978, a twenty count indictment was returned against Barber. Six counts charged that the liquor withdrawal system constituted extortion "under color of official right", in violation of the Hobbs Act, Title 18 U.S.C. section 1951. Thirteen counts charged that the withdrawal system constituted mail fraud. The remaining count charged that Barber had conducted an "enterprise" -- i.e., the office of the state Alcohol Beverage Control Commission

-- through a pattern of racketeering activities, to wit: (a) twelve charges based upon Barber's solicitation or receipt of campaign contributions during the 1972 gubernatorial campaign, six characterized as bribery and six characterized as extortion under color of official right; (b) sixteen charges of extortion under color of official right based upon the liquor withdrawal system; and (c) sixteen charges of bribery based upon cash payments allegedly made by one liquor company representative.[1]

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[1] At the close of the government's case, the district court dismissed nine of the R.I.C.O. predicate charges based upon Barber's solicitation or receipt of campaign contributions, on the grounds that the government's evidence regarding these charges was insufficient to establish bribery or extortion. Although the sixteen bribery charges which were unrelated to campaign contributions were submitted to the jury in support of the R.I.C.O. count, the Fourth Circuit Court of Appeals did not rule on petitioner's challenge to the sufficiency of the evidence supporting these charges, but simply held that "at least two" of the mail fraud and extortion charges which also served as R.I.C.O. predicates had been sufficiently proven, and would

B. The evidence at trial

1. The withdrawal system

The evidence presented at trial established that it was the practice of liquor companies nationally to provide large quantities of "samples" to customers for promotional purposes. In "control" states such as West Virginia, where the industry is regulated by a state liquor commission which is the sole retail distributor of alcoholic beverages, the distribution of these samples must be authorized by the state commission. In West Virginia, a "withdrawal form" (ABCC Form 180) was developed for this purpose. The withdrawal form, according to its pre-printed language, was a request by a liquor company representative to withdraw liquor from the state warehouse for distribution as samples, and was designed to be signed by the company representative

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support the R.I.C.O. conviction. App. A, p. 23a.

requesting the withdrawal and by the ABCC Commissioner authorizing it. Since the state was billed by the distilleries based upon the quantity of liquor products shipped to the state warehouse, all liquor withdrawn from the warehouse for sample distribution was listed on a "debit memorandum" which was sent to the distilleries, claiming a credit to the state's account for the purchase price of the withdrawn liquor.

From the inception of the West Virginia Alcohol Beverage Control Commission in 1935, the overwhelming majority of the companies doing business in West Viginia permitted a portion of the sample distribution to be initiated by the Commissioner himself. Either upon request by a governmental office or civic organization or at his own initiative, the Commissioner would authorize withdrawals from the state warehouse, arrange for distribution of the liquor, and then

request the companies' authorization for the state to receive a billing credit for the withdrawn liquor. Instead of developing new forms for these "Commissioner's withdrawals", the ABCC simply utilized the existing forms which had been developed for sample withdrawals by company representatives -- i.e., the "withdrawal forms" and debit memoranda. The withdrawal forms, signed by the Commissioner, would be presented to the company representatives, with or without a request for their signatures authorizing the withdrawals.[2]

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[2] During Barber's tenure in office, two of the distilleries, for undisclosed reasons, requested that withdrawals initiated by the Commissioner be recorded on a different form, a "breakage affidavit" normally used by the state to claim credit for broken or otherwise "unsaleable" merchandise. This was done, and two extortion counts and three mail fraud counts of the indictment were based upon the use of these breakage affidavits. All of the remaining charges concerning the liquor withdrawal system were based upon the use of the "withdrawal forms" described above.

This practice, which had received considerable public attention through the media in earlier years, was continued by Barber when he assumed office, as he readily admitted on direct examination at trial. Since Barber's operation of the withdrawal system was undisputed, the only real issue at trial concerned the proper characterization of the system -- i.e., whether, as the government contended, it constituted extortion of property, as well as a fraud on the liquor companies and the citizens of the state.

2. The companies' motivation

As the Fourth Circuit opinion affirming Barber's conviction acknowledges, "a majority of the companies considered the withdrawal practice to be a valid 'promotional' device" (App. A, p. 21a). Indeed, several of the company representatives called as government witnesses testified that, when Barber assumed office, they encouraged him to

continue distributing their companies' products through the withdrawal system. More importantly, of the fifteen liquor company representatives (all but one of whom were government witnesses) who testified regarding whether they felt any compulsion to authorize Barber's withdrawals, the overwhelming majority (eleven) stated that they felt no compulsion, and expected no benefits, with respect to their decision to approve the withdrawals. (Excerpts from this testimony are printed in Appendix H hereto.) Only four of the twenty-six liquor company representatives who testified at the trial stated that they felt any compulsion to participate in the withdrawal system. All four attributed this feeling solely to the hypothetical power of petitioner's office, and all denied that Barber had done anything to induce or exploit their feeling of compulsion.

3. The effect of the system

The liquor company witnesses uniformly testified that the withdrawal system did not represent a deceit practiced on their companies. They agreed that although the language of the withdrawal forms was technically false, in that the forms purported to be the companies' own requests to withdraw liquor for sample distribution whereas the forms were being used to request post hoc authorization for liquor which the Commissioner had withdrawn, the companies knew that the forms actually represented withdrawals made by the Commissioner.

A number of the witnesses testified that they viewed the withdrawal system as simply one method of sample distribution, and several stated that they believed the system provided the best possible promotional distribution of their companies' products.

There was absolutely no evidence that Barber displayed any partiality toward the liquor companies who participated in the withdrawal system, or that he threatened or practiced retribution toward those which did not. The unanimous testimony was that Barber was always "scrupulously" or "meticulously" fair in his dealings with all of the companies, and that the withdrawal system had no effect whatsoever upon the conduct of his other duties.

4. The campaign contributions

As noted earlier, see fn.1, supra, three of the R.I.C.O. predicate charges submitted to the jury were based upon Barber's solicitation of political contributions during the gubernatorial campaign of 1972. The three witnesses who testified regarding these contributions all stated that they felt no compulsion whatsoever to comply with Barber's requests, and did not expect any favored treatment if they did so. The witness who

authorized one of these contributions on behalf of Schenley Industries testified that he did so solely because it would help "bring about the election or the re-election [of Governor Moore] and the continuation of Mr. Barber as Commissioner, and as far as Schenley Industries were concerned . . . the entire system had changed to the benefit not only of our company ... but to the other companies as well... I was more concerned about the re-appointment of Mr. Barber because of the job he had done." The other two witnesses testified that they viewed the contributions as routine; one added that his company, like Schenley, was interested in ensuring Barber's re-appointment to office.

5. The government's use of Barber's immunized testimony

The district court conducted extensive hearings, both before and during the trial, concerning whether the

government had made any use of Barber's immunized testimony in the investigation which led to his indictment. As noted above, see page 5-6, supra, the evidence presented at these hearings established that, one year before Barber's indictment was returned, the F.B.I. agents assigned to the investigation had obtained copies of the F.B.I. forms summarizing his immunized testimony. In June of 1978, eleven months before the indictment was returned, the agents gave copies of the 302 forms to B.A.T.F. agents who were still working on the case, and to U. S. Attorney Robert King, Fields' successor in office (Pre-trial transcript, pp. 429, 450). During the following months, King repeated urged his assistants to read the statements[3]. In December of 1978,

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[3] In the fall of 1978, Assistant U.S. Attorney Feinberg was asked by King whether she had read the statements; when she replied that she had not, King handed her a copy to read (Id., pp. 1504-1507).

Assistant U.S. Attorney Rich was asked on two or three occasions whether he

King initiated an unsuccessful search within his office for a transcript of Barber's immunized grand jury testimony. The transcript, apparently misfiled, was located just before the start of the pre-trial hearings (Id., 1201).

The evidence presented at these hearings also established that in January or February of 1979, after discussing the possibility of "verifying whether any promises [of immunity] had been made in connection with the interview" of Barber by former U.S. Attorney Field, King and Assistant U.S. Attorney Betts made a conference call to Field (Id., pp. 1387-

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had read the statements; on one of these occasions, when Rich said that he had not, King unsuccessfully searched in his desk for a copy to give Rich (Id., p. 1426).

Assistant U.S. Attorney Betts was asked by King on three or four occasions whether she had read the statements (Id., pp. 1395-1396). On one occasion, King read aloud to her the portion of Barber's statement which detailed the amount of cash contributions collected by Barber during the 1972 campaign (Id., pp. 1387-1388).

1388). The substance of this conversation was not disclosed during the hearings. At approximately the same time, King asked George Adams, one of the F.B.I. agents working on the investigation, to contact the agent who had prepared the 302 forms "to ask him to contact [King's] office and to determine what his recollection was and what he understood about any promises made to Mr. Barber in the interview ... concerning possible immunity from prosecution and this type of thing" (Id., pp. 509-510). Adams did so, and reported "the result of our conversation" to King and Assistant U.S. Attorney Rich (Id.). Again, the substance of these conversations with the agent who had prepared the summaries, and who had been present during Barber's immunized interview, was not revealed.

At least three of the Assistant U.S. Attorneys and one F.B.I. agent involved in the Barber investigation had also held

those positions during the Moore investigation. One of these, Assistant U.S. Attorney Rich, was an active participant in the Moore trial, and served as King's chief assistant during the Barber investigation.[4]

The government agents and attorneys who testified during the pre-trial hearings uniformly stated that they had made no use of Barber's immunized statements. They testified that, independently of their early May, 1978 receipt of the F.B.I. form 302's, the investigation had focused upon possible cash payments, including campaign contributions, because this was a natural

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[4] Although Barber had been subpoenaed as a government witness for the Moore trial to testify regarding his collection and delivery to Moore of cash campaign contributions, the district judge conducting that trial, after protracted bench conferences concerning the issue at which both U.S. Attorney Field and Assistant U.S. Attorney Rich were present, ruled such evidence inadmissible. Accordingly, Barber did not testify at the trial. Governor Moore was ultimately acquitted of all charges.

part of any investigation of a state official.[5] The district court refused Barber's request that the government be required to negate the possibility that the source of the information regarding cash contributions which was given to the

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[5]They also testified that the following information regarding cash payments had been gathered before their receipt of the 302's:

- Patrick Boggs, Barber's successor in office, had provided the first information regarding possibly illegal cash payments, while attempting to persuade the B.A.T.F. to re-open its investigation in 1977. (Boggs, who at the time of the Moore investigation was an assistant prosecutor for the county in which the trial was conducted, did not testify in this case. Neither the substance of the information which he had provided the B.A.T.F., nor the source from which he had obtained the information, was revealed.)

- In March and April of 1978, a Hiram Walker representative informed the investigators that during Barber's tenure he had paid for some of Barber's travel expenses on several occasions and twice had given Barber $200 as a Christmas present.

B.A.T.F. by Patrick Boggs in 1977, and which was the first information received by any of the federal agencies involved in the Barber investigation, was Barber's immunized testimony.

C. The rulings below

1. The Hobbs Act presumption

At trial, the petitioner unsuccessfully moved for a judgment of acquital on all of the Hobbs Act charges, on the grounds that the government had failed to prove an essential element of the offense: i.e., that the liquor companies which had given campaign contributions to Barber, or which had

permitted him to withdraw their liquor products, had acted under "a reasonable feeling of compulsion."[6]

In considering this issue on appeal, the Fourth Circuit created a presumption to fill what it perceived as an absence of any evidence concerning whether or not the companies actually felt such compulsion:

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[6]The district court instructed the jury regarding this requirement as follows:

> Now, neither the mere voluntary payment of money, including political contributions whether solicited or not, nor the delivery of property, unaccompanied by any reasonable fear of economic loss, constitutes extortion, unless the payment or delivery was made under some form of compulsion or inducement by virtue of the defendant's office...[E]xtortion under color of official right by a public officer need not involve actual force or threat. But the person to be extorted must, under all the facts and circumstances of the case, acting as a reasonable and prudent person, have a reasonable belief or feeling that he is compelled to make a payment because of that public officer's wrongful use of his official position for the purpose of obtaining such payment... [Trial transcript, pp. 1767-1768].

> The giving of free liquor in substantial quantities is altogether contrary to custom, unless there is a reason, i.e., an expectation of a quid pro quo. When the "donee" is the state's alcoholic beverage chief, the conclusion is irresistible that, absent a convincing explanation, the "gift" was not a gift, but rather, was in return for favors or for the withholding of punitive measures. No such convincing explanation has been forthcoming here. Its absence provides an adequate basis for an inference that a true gift was not the purpose of the liquor companies, and that, as far as the liquor companies were concerned, there was nothing voluntary about the withdrawals...
>
> Hence, on the evidence, there was a fully adequate basis for a jury finding that the benefits accruing to Barber were not true gifts but rather were extracted, with the donors' consent, under color of official right.
>
> App. A, pp. 15a-17a.

In creating this presumption, and affirming Barber's convicton based on it, the court overlooked the following facts: (a) the Hobbs Act charges which served as predicate crimes for the R.I.C.O. count were based upon

solicitation of campaign contributions as well as the liquor withdrawal system;[7] (b) the evidence at trial established that "the giving of free liquor in substantial quantities" was altogether consistent with the liquor industry's promotional customs; and (c) the evidence at trial affirmatively established that most of the companies authorizing withdrawals in fact did not do so "in return for favors or for the withholding of punitive measures," see App. H.

2. The questions regarding petitioner's assertion of the Fifth Amendment privilege

On cross-examination, despite his earlier testimony that he had made withdrawals "from most all of the ... companies that were doing business in West

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[7] The court's opinion acknowledges that "other public policy objectives" might dictate against applying the court's presumption to a public official's solicitation of campaign contributions, App. A, p. 13a, but incorrectly states that the Hobbs Act charges in this case were based solely on the withdrawal system. Id., pp. 16a-17a.

Virginia," Barber was asked a series of questions designed to have him repeatedly "admit" to having withdrawn liquor from each of the companies listed in the indictment, one by one. In the midst of this line of questioning by the U. S. Attorney, and in direct response to a question concerning whether he had ever withdrawn products of the A. Smith Bowman Company, Barber responded: "I never denied that. Your people spent two years trying to get that information, and if they had came [sic.] to me the first day I would have told them." The government was then permitted to repeatedly question Barber regarding his refusal, two years after the investigation had begun and after he had been informed that he was the target of the grand jury which eventually indicted him, to appear before the grand jury.[8] (The text of this questioning is printed in Appendix H hereto, at p. 132a.)

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[8] Barber never actually appeared before

The Fourth Circuit Court of Appeals rather summarily affirmed the district court's ruling that this questioning was proper:

> Here, Barber gave a justifiable reason to the prosecutors by testifying that, "had be been afforded the opportunity", he would have stated to the prosecutor his position on the matters in question before he was indicted.
>
> That opened the door for the establishment of the fact that, upon being called before the grand jury, Barber pleaded the Fifth Amendment. We are not impressed by the quibble that he was ready to tell all to the prosecutor but not to the grand jury.
>
> App. A, p. 24a.

3. The admissibility of the company guilty pleas

Prior to appellant's trial, a number of the distilleries named in the Barber indictment had entered guilty pleas to misdemeanor charges of "giving any bonus,

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the grand jury. When the subpoena was served, Barber's attorney wrote the United States Attorney, informing him that Barber would assert his Fifth Amendment privilege. The government then did not attempt to force him to appear.

premium or compensation to any ... trade buyer" through their participation in the withdrawal system, in violation of Title 27 U.S.C. section 205(c)(2). At the trial, the government was permitted to bring out through its own witnesses the fact that their companies had entered such pleas and had been punished for their transgressions, in order to prove that the companies had been "harmed" by Barber's actions in continuing the withdrawal system.

The Fourth Circuit's opinion adopts the government's argument, and holds that evidence of the companies' guilty pleas "was relevant and proper" to show that the alleged victims of the withdrawal system actually had been harmed.

4. The mail fraud instructions.

At trial, Barber unsuccessfully sought to have the court instruct the jury on what activities would be sufficient to establish one charge of the indictment:

defrauding the public of its right to his "honest and faithful services". The Fourth Circuit opinion upholds the use of jury instructions without any such definition, and further holds that the mere use of "false" withdrawal forms and affidavits was sufficient to establish this offense, since it deprived the public of the opportunity to monitor the affairs of a state agency.

5. Possible juror bias.

During the voir dire examination of potential jurors in this case, one of the panel stated that her brother, James McClaskie, had been convicted in the same court a year previously on a gambling charge. When the United States Attorney then suggested that he personally had prosecuted her brother, the juror stated that "this fact" would not cause her to be prejudiced for or against the government. Neither the government nor the defense

challenged the juror, and she was one of the twelve jurors who returned the verdict of conviction.

While Barber's appeal to the Fourth Circuit was pending, the defense learned that the same United States Attorney had appeared on behalf of McClaskie at his sentencing hearing, prompting the court to remark that he had just "received some help from an unexpected source."

The Fourth Circuit ruled that "nothing more than a potentially suspicious circumstance had been shown, and something more than an unverified conjecture is required to justify grant of a new trial. 'A showing of a possibility of prejudice is not enough.'"

6. The R.I.C.O. "enterprise".

Prior to trial, Barber moved to dismiss the R.I.C.O. count of the indictment, on the grounds that the office of the state A.B.C. Commissioner was not an "enterprise" within the scope of that

statute. The district court, in an opinion printed in Appendix B hereto, ruled that a governmental office could consitute a R.I.C.O. enterprise. During the trial, the district court went even further, and instructed the jury as a matter of law that Barber's office constituted an enterprise within the meaning of R.I.C.O. (Trial transcript, 65, 1775, 1786).

Barber did not initially raise this issue on appeal, because the Fourth Circuit had previously held that a governmental office was a R.I.C.O. enterprise, and because application of the Fourth Circuit's ruling in United States v. Webster, 639 F.2d 174 (1981), cert. denied 102 S.Ct. 307 -- that the "enterprise" must have benefitted from the racketeering activity -- would have required reversal of the R.I.C.O. count in any event.

On the same day this case was decided by the Fourth Circuit, the court overruled the Webster holding on rehearing. A short time later, the Sixth Circuit Court of Appeals, in United States v. Thompson, became the first Court of Appeals to hold that R.I.C.O. enterprises do not include state governmental offices. (The Thompson opinion is printed in Appendix I hereto.) Barber accordingly included this issue in his petition for rehearing before the Fourth Circuit. The court denied the motion without opinion.

7. The use of immunized testimony

Both the district court and the Court of Appeals held that the government had met the burden of showing that this prosecution was not tainted by any use of Barber's immunized testimony, by testimony of the federal agents and attorneys that they made no use of the F.B.I. form 302's which were in their possession, and by the government's showing that it developed

information regarding Barber's solicitation of campaign contributions independently of the immunized testimony.

ARGUMENT

A. The Hobbs Act presumption

The Fourth Circuit held in this case that a state official's mere receipt of property from companies doing business with the state creates a presumption of compulsion which is sufficient by itself - absent a "convincing explanation" otherwise by the defendant - to meet the reasonable doubt standard of proof for a Hobbs Act conviction for extortion under color of official right. The Fourth Circuit's holding is unprecedented, and its potential impact upon the conduct of governmental offices -- including the solicitation of campaign contributions by office-holders -- merits this Court's review.

Every other Circuit Court of Appeals' affirmance of a Hobbs Act "color of official right" extortion conviction has been based upon evidence that the defendant official used his official office as either a "carrot" or a "stick" (or both), obtaining money or other property through express or implied promises to use his official power to the benefit or detriment of the potential payor.

The "carrot" cases involve the acceptance of property by an official with the knowledge that the payment is made to influence the performance of his official duties.[9] In this type of extortion under

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[9] E.g., United States v. Grande, 620 F.2d 1026 (4th Cir. 1980)(payments from contractors in return for official's supplying inside cost data on bids); United States v. Butler, 618 F.2d 411 (6th Cir. 1980)(payment to official in exchange for occupancy permit for non-qualifying building); United States v. Bright, 630 F.2d 804 (5th Cir. 1980)(payments to sheriff "in return for implied, if not express, promise not to enforce the law" against payor); United States v. French, 628 F.2d 1069 (8th Cir. 1980)(payment to

color of official right, no duress is required, and it is irrelevant that the "conduct may also constitute 'classic bribery,' United States v. Braasch, 505 F.2d 139, 151 (7th Cir. 1974), cert. denied, 421 U.S. 910. However, all of the "carrot" cases share one essential feature: in each case, the defendant obtained property "with the knowledge that it was paid to induce him to perform or

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city marshal in return for favorable "settlement" of money due city on forfeited bonds); United States v. Gates, 616 F.2d 1103 (9th Cir. 1980)(payments to official in return for non-enforcement of zoning and permit requirements); United States v. Hedman, 630 F.2d 1184 (7th Cir. 1980)(payments to city inspectors in return for non-enforcement of code and permit requirements); United States v. Hall, 536 F.2d 313 (10th Cir. 1976), cert. denied, 429 U.S. 919 (payments to governor in return for influencing state retirement system trustees to buy payor's notes); United States v. Mazzei, 521 F.2d 639 (3d Cir. 1975)(en banc), cert. denied, 434 U.S. 1014 (payments to state senator in return for preferential treatment in awarding of state leases). See also, United States v. Gillock, 100 S.Ct. 1185 (1980)(on motion to suppress evidence)(payments to state legislator in return for blocking extradition and sponsoring special legislation).

fail to perform official functions," United States v. Price, 617 F.2d 455, 458 (7th Cir. 1979), or to "misuse his office to favor" the payor, United States v. Grande, 620 F.2d 1026 , 1031 (4th Cir. 1980).

There was absolutely no evidence in this case that any of the liquor companies which made political contributions or participated in the withdrawal system expected or received any favored treatment in return. The government never advanced this theory of extortion and the district court did not instruct the jury on it. See n.5, supra. Nevertheless, the Fourth Circuit opinion holds that, "absent a convincing explanation" by the defendant, the jury could properly have convicted Barber of extortion on the unsupported presumption that the companies' motivation was "an expectation of a quid pro quo." App. A, pp. 15a, 16a.

This holding is unprecedented, and is in direct conflict with the position of the Eighth Circuit Court of Appeals, that an official's receipt of payments does not constitute extortion if the "evidence failed to show that the payments affected the [official's] 'discretionary judgment or resulted in any official preferential treatment,'" United States v. French, 628 F.2d 1069, 1075 n.5 (8th Cir. 1980)(citation omitted).

The Fourth Circuit's presumption is equally unprecedented when applied to the "stick" line of extortion cases, which involve public officials who exact money or other property as a condition of receiving fair treatment, or of avoiding mistreatment, from the defendant's office.[10] An element of actual compulsion

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[10] E.g., United States v. Cerelli, 603 F.2d 415 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (equipment lessor required to pay kickbacks to officials as conditon of receiving state contracts); United States v. Price, supra (builder had reasonable belief that payment to city inspectors

is clear in each of these cases, ranging from the "unspoken threat" of United States v. Price, supra at 458 (city inspector's acceptance of payment, given with comment that payor knew that "in Chicago that I got to do it and that's all"), to the more explicit expression in United States v. Addonizio, 451 F.2d 49 , 57 (3d Cir. 1972), cert. denied 405 U.S. 936 (kickbacks demanded by city officials

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required to avoid harassment); United States v. Phillips, 577 F.2d 495 (9th Cir. 1978), cert. denied, 439 U.S. 831 (redevelopment agency would consider payment claims only if contractors paid off agency members); United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (supporters of legislation required to hire house speaker or his friend to avoid burial of bills in committee); United States v. Hathaway, 534 F.2d 368 (1st Cir. 1976), cert. denied 429 U.S. 819 (contractors required to pay officials in order to be considered for building contract awards); United States v. Braasch, supra (liquor establishments required to pay police to avoid harassment); United States v. Hyde, 448 F.2d 815 (5th Cir. 1971)(companies required to pay state attorney general under treat of license revocation proceedings); United States v. Kenny, 463 F.2d 1972 (3d Cir. 1972)(contractors required to pay kickbacks to officials as condition of obtaining contracts).

under threats ranging from "everybody in Newark pays ten percent or they don't work in Newark," to "you pay your ten percent or I'll break both your legs").

Virtually every other Circuit Court considering the "stick" variety of extortion has held that, as the district court instructed the jury in this case, see n.6, supra, the government must prove that the property was given "under some form of compulsion, United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), in that the victim reasonably felt compelled to give up the property because of the defendant's wrongful use of his official position, United States v. Price, supra. In this case, the Fourth Circuit has effectively removed this requirement.

The Fourth Circuit rule, as stated in this case, is that the government can meet its burden of proof for a Hobbs Act conviction simply by showing that an official received something of value from

a person doing business with the defendant's office. The defendant then bears the burden of disproving a presumption of extortion, by providing a "convincing explanation".

Moreover, the defendant's burden is apparently a heavy one under the Fourth Circuit's rule. Although the court acknowledges that "a majority of the companies considered the withdrawal practice to be a valid 'promotional' device," App. A, p. 21a, it still concludes that "no such convincing explanation [rebutting the presumption that "the 'gift' .. was in return for favors or for the withholding of punitive measures"] has been forthcoming here." Id., p. 16a.

The court's opinion does not purport to find any actual evidence in the record to support a finding the the liquor companies' authorization of withdrawals was based upon either fear of retaliation

or an expectation of favors. The court, in fact , simply ignores considerable evidence to the contrary. In affirming the conviction, the court rests proof of this essential element of the government's case, e.g., United States v. Price, supra, entirely upon the presumption. This Court has held that the prosecution "may not rest its case [with respect to an essential element of an offense] entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." County Court of Ulster County v. Allen, 99 S.Ct. 2213 (1979). The facts proved in this case -- that Barber was a public official and that he received political contributions and permission to withdraw liquor from companies doing business with his office -- are simply not sufficient to support the inference, beyond a reasonable

doubt, that the companies acted out of an actual and reasonable fear of retaliation or expectation of favors.

The Fourth Circuit opinion also has awesome implications for the future conduct of political campaigns. The court's opinion suggests that its presumption of extortion might not apply to an official's solicitation of campaign contributions (overlooking the fact that some of the charges affirmed in this case involved just that). App. A, p. 13a. However, in applying a presumption which serves as proof of the donor's motivation, there is no logical basis for distinguishing between donations of campaign funds and donations of any other type of property.

"[I]f a public official who asks for a political contribution from one who does, or may do, business with the government can be prosecuted on proof of those fact alone, then the Hobbs Act has

become an extraordinary mechanism for controlling political activity on the state and local levels." Ruff, Federal Prosecution of Local Corruption, 65 Georgetown L.J., 1171, 1196 (1977). The Fourth Circuit's opinion is the first case holding that the Hobbs Act has become such "an extraordinary mechanism for controlling political activity." The importance of this issue -- and the conflict between the Fourth Circuit's interpretation and that of the other Circuits -- merits review by this Court.

B. The questions regarding petitioner's assertion of the Fifth Amendment privilege

What the Fourth Circuit views as "quibbling", this Court has viewed as a serious constitutional issue -- i.e., whether a person's unwillingness to appear before a grand jury which has clearly "targeted" him for indictment is inconsistent with that same person's asserted willingness to discuss the case

under less accusatorial circumstances. In Grunewald v. United States, 353 U.S. 391 (1957), this Court relied upon the distinction between the two circumstances to reverse a conviction because of improper impeachment questioning:

> [T]he Fifth Amendment claim was made before a grand jury where Halperin was a compelled, and not a voluntary, witness; where he was not represented by counsel; where he could summon no witnesses; and where he had no opportunity to cross-examine witnesses testifying against him. ... [T]he nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment. Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedures provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.
>
> Finally, and most important, we cannot deem Halperin's plea of the Fifth Amendment to be inconsistent with his later testimony at the trial because of the nature of this particular grand jury proceeding. For, when

> Halperin was questioned before the grand jury, he was quite evidently already considered a potential defendant. ... [T]he scheme was...in essence already revealed when Halperin was called to testify. Under these circumstances it was evident that Halperin was faced with the possibility of an early indictment, and it was quite natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself. It was thus quite consistent with innocence for him to refuse to provide evidence which could be used by the government in building its incriminating chain. For many innocent men who know that they are about to be indicted will refuse to help create a case against themselves under circumstances where lack of counsel's assistance and lack of opportunity for cross-examination will prevent them from bringing out the exculpatory circumstances in the context of which superficially incriminating acts occurred.
> 353 U.S. at 422-23.

The situation faced by Barber when he was subpoenaed to appear before the grand jury was even grimmer than that faced by Halperin. The federal investigation of Barber had been proceeding for two years, and a large number of liquor companies had

already been indicted, and in some cases convicted, based upon either their participation in the withdrawal system or for making political contributions through Barber. Barber, who was clearly the prime target of the entire investigation, reasonably expected to be indicted momentarily. His unwillingness to appear under these circumstances, and to help the government build its case against him, is not at all inconsistent with his statements at trial the he "had never denied" making the liquor withdrawals, and that the federal prosecutors had "spent two years trying to get that information and they they had come to [him] on the first day [he] would have told them."

Moreover, even assuming that Barber's testimony "opened the door" for the government to establish that he had declined to appear before the grand jury, the prosecutor's repeated questioning

about this fact -- a series of six questions -- gave impermissible emphasis to this fact.

The Fifth Circuit has recognized that, if the defense "opens the door" to questioning about the defendant's assertion of his Fifth Amendment privilege, this is still only one of a number of factors which must be considered in determining whether the prejudicial effect of the questioning, weighed against its probative value, denied the defendant of a fair trial. United States v. Dixon, 593 F.2d 626 (5th Cir. 1979). The Fourth Circuit did not even purport to apply such a balancing test in this case.

The Fourth Circuit's apparent decision to simply ignore this Court's opinion in Grunewald, and to characterize the issue as mere quibbling, requires review.

C. The liquor company guilty pleas.

The Fourth Circuit's ruling on this issue -- that the company guilty pleas were properly introduced in support of the mail fraud charges as proof that the companies were harmed by the withdrawal system -- represents the first time that any court has permitted the introduction of a co-participant's conviction as substantive evidence of a defendant's guilt. Other Circuit Courts of Appeal have recognized the danger of admitting such testimony even for the limited purposes of impeachment. E.g., United States v. Corona, 551 F.2d 1386, 1388 (5th Cir. 1977)("the prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participant is obvious"); United States v. Handley, 591 F.2d 1125, 1128 (5th Cir. 1979)(prosecutor's reference to guilty pleas of defendant's alleged co-conspirators in plain error); United States v. Binger, 469 F.2d 275, 276 (9th

Cir. 1972)(recognizing the "real danger that jurors will give undue emphasis to a crime partner's guilty plea. It impinges on a defendant's right to be tried solely on the evidence").

Even aside from the prejudicial effect of such evidence, it is inconceivable that this type of "injury" was ever intended by Congress to be within the scope of the extortion or mail fraud statutes. The Fourth Circuit's bootstrap reasoning, which permits an individual to be convicted of mail fraud on the basis of a co-participant's conviction of that charge, is a novel and alarming construction of the prerequisites for criminal liability, particularly when applied to an offense such as mail fraud which requires specific intent. The decision merits review by this Court.

D. The mail fraud instructions.

The Fourth Circuit's broad ruling regarding the scope of the mail fraud statute's application to the "honest and faithful" performance of a public official's duties is inconsistent with established case law from other circuits, particularly the Court of Appeals for the Eighth Circuit. In a series of cases involving officials' receipt of undisclosed payments, the Eighth Circuit has reversed convictions, holding that "[i]n the absence of evidence that [the defendant] accorded preferential treatment to the payor of the gratuities or otherwise did not conscientiously perform the duties of his office, [his conduct] could not be held a 'scheme to defraud' within the meaning of the mail fraud statute." United States v. Brown, 540 F.2d 364, 374 (8th Cir. 1976)(citing United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976). Accord: United States v. Rabbitt, 583 F.2d 1014, 1024 (8th Cir.

1978)(under established mail fraud standards, state legislator's concealed receipt of kickbacks was not violation unless it caused tangible loss to state or caused him to fail "to carry out the duties and responsibilities of his legislative office ... for the sake of [the payor]").

There was no evidence whatsoever in this case that Barber's participation in the withdrawal system had any effect on the performance of his duties. The testimony of the government's own witnesses established that Barber was always "scrupulously" impartial, and that his judgment on official matters was never influenced by the withdrawals. These factors distinguish this case from virtually every other reported case of a public official convicted of defrauding citizens of their right to the "honest and faithful" conduct of his duties.

According to the Eighth Circuit, "[e]very case of breach of public trust and misfeasance in public office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud offense," United States v. Rabbitt, supra. According to the Fourth Circuit, virtually any conduct by a public official which does not meet a particular jury's standards of "honest and faithful service," and in connection with which some mailing occurred, does fall within the confines of the mail fraud statute. This construction of the statute's scope is so amorphous, and such a departure from established standards in other circuits, to merit this Court's review.

E. Possible juror bias.

After the Fourth Circuit's decision in this case, this Court ruled that where the possibility of prejudice on the part of a juror is discovered after trial,

constitutional due process requirements are satisfied by a hearing at which the possibility of prejudice may be explored. Smith v. Phillips, 102 S.Ct. 940 (1982). Under the Fourth Circuit's ruling, a defendant who discovers grounds for a possible challenge to the partiality of a juror after trial is at a severe disadvantage. There is simply no way to make the concrete showing required by the court. The constitutional guarantee of a fair and impartial jury requires that the defendant at least be given an opportunity to develop a record during post-trial proceedings.

Here, where the Court's supervisory authority over the federal system is also involved, the deliberate withholding of material information regarding possible juror bias by a United States Attorney merits, at the least, a remand for a hearing to determine whether bias in fact exists.

F. The R.I.C.O. "enterprise".

In United States v. Thompson, __ F. 2d __, No. 81-5167 8th Cir. 1982), the Sixth Circuit noted that the remedial provisions of R.I.C.O. make its application to a state governmental office an anomaly, and accordingly held that such offices cannot constitute the "enterprise" upon which a R.I.C.O. conviction can be based. Appendix I. In reaching this conclusion, the court noted that only two other federal courts had undertaken similar examinations of the history and structure of R.I.C.O. to determine whether the statute's remedial power precludes it application to local governments: the Second Circuit, in United States v. Angellili, 660 F.2d 23 (2d Cir. 1981), and the district court in this case.

The direct conflict between the district court's published opinion in this case and the Sixth Circuit's opinion in

Thompson would, in itself, be a sufficient reason for review by this Court. However, the Barber court's ruling during the trial that, as a matter of law, the A.B.C.C. constitutes an enterprise, also appears to be in conflict with this Court's statement in United States v. Turkette, 452 U.S. 576, 583 2524 (1981), that "the existence of an enterprise at all times remains a separate element which must be proved by the government... The [enterprise] is proved by evidence of an on-going organization, formal or informal, and by evidence that the various associates fuction as a continuing unit."

It is fundamental that an essential element of a crime "can never be ruled as a question of law", no matter how "clear the proof may be, or however incontrovertible [it] may seem to the judge." Morissette v. United States, 342 U.S. 246, 274 (1952). The district court's action in this case, in ruling as

a matter of law that an element of the crime had been established, violated this principle, and the decision should be reviewed by this Court.

G. The use of immunized testimony

This Court had never determined what standard must be met by the government to disprove the presumption of taint which arises when an individual testifies under a grant of immunity and is later prosecuted and convicted by the same jurisdiction, based partially on the same subject matter of the immunized testimony. This case presents that question clearly.

Othe federal courts have held that, where the prosecution has actually read the immunized testimony during its investigation, there is a virtually conclusive presumption of taint due to the "immeasurable subjective effect" the prosecution's knowledge of the immunized testimony has, and the impossibility of the defendant, without access to the

government files, ever establishing that the immunized testimony was actually used. E.g., United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); United States v. Dornau, 359 F.Supp. 684 (S.D.N.Y. 1973), rev'd on other grounds, 491 F.2d 473 (2d Cir. 1974). Since testimony obtained under a grant of immunity reflects the Fifth Amendment "in its most pristine form", United States v. Portash, 440 U.S. 450 (1978), this Court has held that the government has a "heavy burden" of showing that the testimony was not used "in any way", and the defendant need not rely on the government's bald denials. United States v. Kastigar, 406 U.S. 441.

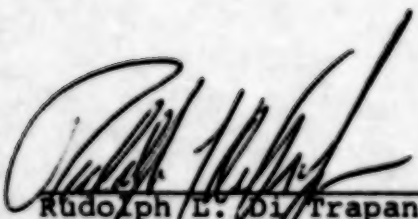
Both the district court and the Fourth Circuit Court of Appeals in this case forced the defendant to rely on the government's good faith in denying any use of the testimony, in the face of an extraordinary interest shown by the government in the immunized testimony.

The rulings below violate the spirit of Kastigar, and merit review by this Court.

Conclusion

For the reasons state above, J. Richard Barber respectfully asks this Court to issue a writ of certeriorari to the United States Court of Appeals for the Fourth Circuit, to review that court's affirmance of his conviction.

J. RICHARD BARBER
BY COUNSEL



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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1981

NO.

J. RICHARD BARBER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 79-5278

United States of America,
Appellee,
v.

J. Richard Barber,
Appellant.

Appeal from the United States District Court for the Southern District of West Virgina, at Charleston. John T. Copenhaver, Jr., District Judge.

Argued May 8, 1981 Decided Jan. 14, 1982

Before BUTZNER AND MURNAGHAN, Circuit Judges, and RAMSEY*, District Judge.

* The Honorable Norman P. Ramsey, United States District Judge for the District of Maryland, sitting by designation.

MURNAGHAN, Circuit Judge:

J. Richard Barber was, from 1969 on, an official of the West Virgina Beverage Control Commission ("ABCC") rising in April, 1973 to the top position of Commissioner, which he held until at least September, 1976. An indictment was returned against him on May 2, 1979. Barber was convicted of violating the Racketeer Influenced and Corrupt Organization ("RICO") statute, 18 U.S.C. § 1962(c) (one count), the Hobbs Act, 18 U.S.C. § 1951 (six counts), and the mail fraud statute, 18 U.S.C. § 1341 (thirteen counts). He was sentenced on each count to three years imprisonment, all impositions to be served concurrently.

At trial, the government introduced evidence to show that Barber used his position as ABCC Commissioner to obtain free liquor for himself and numerous high officials of the state, and that he solicited and accepted cash payments from

certain liquor companies. According to the government's proof, the Commission, which held a monopoly on alcoholic beverage sales in West Virginia, maintained a "withdrawal" system whereby liquor company representatives could, for business promotional purposes, withdraw liquor from the state's warehouse (the liquor having already been paid for by the state), and then reimburse the state for its withdrawal.

Prior to 1970, when the defendant became Commissioner, the Commissioner began using the system in reverse. Utilizing the same ABCC documents, the Commissioner himself began to withdraw liquor and to obtain "authorization: from the liquor companies after-the-fact. The companies would then be billed by the warehouse for the withdrawal quantities, although they found their way, not to the companies, but to destinations designated by the Commissioner.

The proof at trial also permitted a finding that during 1975 and 1976 Barber manipulated the breakage" system in a similar fashion. Normally, when a shipment included damaged products, the warehouse would send an "Affidavit Concerning Damage" to the concerned company, which thereupon absorbed the breakage loss. According to trial testimony, Barber, with respect to two of the companies, manipulated the breakage system by setting aside for his own use salable merchandise, but reporting it to the company concerned as breakage.

Finally, the defendant was charged with soliciting and accepting thousands of dollars in bribes from certain liquor companies. One witness, for example, testified that, in response to a plea for a political contribution, American Distilling Company authorized him to give

Barber $1,000, which the witness then delivered in cash to Barber in a white envelope.

On September 17, 1975, Barber was interviewed by an FIB agent concerning his knowledge of campaign financing during the 1972 gubernatorial election. The FBI prepared a summary of the interview on an "FBI 302" form. Subsequently, in December, 1975, Barber was subpoenaed by a grand jury investigating Governor Arch A. Moore. Again he was interviewed, this time by the United States attorney, with an FBI agent present. Again an FBI 302 form was prepared. Barber also testified before the grand jury. The trial judge found that, on December 11, 1975, the then United States attorney "implicitly assured" Barber and his attorney that his responses to questions in the September and December, 1975 interviews and the

December, 1975 grand jury hearing "would not be used against him either directly or through leads gained therefrom."

On appeal, Barber raises several arguments, ranging from whether the "taint" of the use immunity of his testimony affected the government's preparation of the indictment and prosecution of him, to the sufficiency of the evidence to convict him, to the charge that he was selectively prosecuted, and finally to the contention that for various reasons he was denied a fair trial.

I. "Use Immunity Question"

In May, 1978, after the government began investigating Barber's conduct as Liquor Commissioner, the 1975 FBI 302 forms summarizing Barber's interviews (for the contents of which Barber had been granted use immunity) were discovered by agents of the United States involved in the investigation. Barber contends that the government failed to rebut the

presumption that the investigation was tainted by the May, 1978 discovery and knowledge of the contents of the 1975 interviews. Therefore, he argues, that the entire indictment should have been dismissed.

Defendant's contentions must be rejected. First, the inculpatory statements made in the 1975 interviews all relate to acts involving the 1972 election and Barber's use of his office to raise money for the governor's campaign war chest. The thrust of several counts in the instant indictment is, on the other hand, directed towards the quite distinct matter of the defendant's use of the withdrawal system. Thus, even if we should assume that the FBI 302 forms were wrongly used by the government in its investigation of Barber, nevertheless, the information contained in the form could

have been of no use with respect to the subsequent liquor withdrawal investigation.

Second, by the time the prosecution gained access to the FBI 302 forms, its investigation was already well under way. The government has satisfactorily demonstrated that, before it became aware of the FBI 302 forms, it had already learned of the matters mentioned in the forms. In apparent recognition of the force of the government's presentation, Barber retreats to the position that the information contained in the forms was the first confirmation received by the prosecutors of their independently obtained information that Barber had been involved in the solicitation and collection of campaign funds.[1]

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[1]Reliance is placed by Barber on language in Kastigar v. United States, 406 U.S. 441, 453 (1972), prohibiting use of immunized testimony "in any respct." (Emphasis in original). C.f. New Jersey v. Portash, 440 U.S. 450, 459 (1979)

(footnote continued)

The supposition, however, is refuted by testimony of the FBI agents and government lawyers that they had made no use of the immunized statements. Given that the investigation was already focusing, before the FBI 302 forms surfaced, on all aspects of Barber's use of his office to extract benefits from the liquor industry, it strains credulity to assert that the government would not have uncovered, quite independently of the forms, further confirmation of its strong investigatory leads. The manner in which things evolved downplays any significance of the FBI 302 forms as confirmation.

There is no indication of game playing by the government, no effort to obtain an unfair advantage. Rather papers have again displayed an understandable propensity to get lost in the bureaucratic

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("[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law.") (Emphasis in original).

maze. We conclude that the district judge was justified in his determinations that there simply was no violation of the use immunity conferred on Barber, inasmuch as: (a) the government was unaware of the grand jury transcript for December 11, 1975 until late June of 1979 and had not used it for investigation purposes or for preparation for trial in the present case, and (b) while the government knew of the FBI forms for the September and December 1975 interviews since at least the summer of 1978, the government had satisfactorily established that the immunized statements had not been used in connection with the instant case.

II. Selective Prosecution

Barber contends that he was selectively prosecuted. Pointing to the longstanding nature of the withdrawal system, he argues that he was singled out for prosecution because of poor prosecutorial motives. However, the

defendant has a heavy burden to prove "invidious discrimination," (United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972), based upon an "arbitrary classification," Oyler v. Boles, 368 U.S. 448, 456 (1962). That affirmative obligation has not been satisfied. While there was testimony that the withdrawal system existed for years before Barber took over as Commissioner, there was also abundant testimony that the defendant took advantage of the system far more than any earlier Commissioner, and also that Barber's immediate predecessor did not improperly use the withdrawal system.

There is simply nothing here pointing to arbitrary, bad faith considerations such as race, religion, or the desire to prevent exercise of constitutional rights. See, e.g., Crowthers, supra, (First Amendment right to protest); United States v. Ojala, 544 F.2d 940 (8th Cir. 1976). We have simply the prosecutor's judgment

leading to prosecution, and it cannot simply be assumed to have been based on an unworthy motive.

III. Sufficiency of the Evidence

A. Hobbs Act

Barber first argues that his conviction under the Hobbs Act, 18 U.S.C. § 1951, is not supported by sufficient evidence.

The Hobbs Act proscribes extortion, defined, for the purposes here pertinent, as obtaining property from another, with his consent, "under color of official right." The provision has been interpreted so as

> not [to] require proof of specific acts by the public officials demonstrating force, threats, or the use of fear so long as the victim consented [to the provision of a benefit] because of the office or position held by the official who obtained the money.
>
> If the public official knows the motivation of the victim focuses on the public official's office and money is obtained by the public official which was not lawfully due and

In several other Hobbs Act cases cited by the government, there was some showing that the defendant provided favors or withheld the negative force of his office if the victim made some payment. See, e.g., United States v. Grande, 620 F.2d 1026, 1031-32 (4th Cir. 1980), cert. denied, 449 U.S. 830 (1980) (official misused the office to favor the payor by supplying information and channeling contracts); United States v. Hathaway, 534 F.2d 386, 394-96 (1st Cir. 1976), cert. denied, 429 U.S. 819 (1976) (payor feared that, without making payment, he would not receive construction contract; the defendant stated he was under pressure to award

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Furthermore, asking for a campaign contribution does not typically involve falsification of documents such as took place here. The very fact of such shenanigans bears on the extreme unlikelihood that the liquor companies regarded what they were doing as voluntary rather than compelled--subtly perhaps, but compelled nonetheless.

contract to others, but after payor gave defendant money, payor received contract); United States v. Braasch, 505 F.2d 139, 150-52 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975) (roving police officers shook down bars that did not pay up).

In the case at hand, there was not much direct evidence as to why the liquor companies continued to authorize the withdrawals of liquor by the defendant. On only one of the six Hobbs Act counts was there testimony that the companies acquiesced because the withdrawal practice "was being done with the other distillers and for that reason I did not want to pull out."

yet, in the circumstances of the case, the absence of direct testimony as to motive is of little help to Barber. It is inescapable that the authorization would not have been given had not Barber been Commissioner. The giving of free

liquor in substantial quantities is altogether contrary to custom, unless there is a reason, i.e., an expectation of a quid pro quo. When the "donee" is the state's alcoholic beverage chief, the conclusion is irresistible that, absent a convincing explanation, the "gift" was not a gift, but, rather, was in return for favors or for the withholding of punitive measures. No such convincing explanation has been forthcoming here. Its absence provides an adequate basis for an inference that a true gift was not the purpose of the liquor companies, and that, as far as the liquor companies were concerned, there was nothing voluntary about the withdrawals.

The Hobbs Act charges related solely to the withdrawal system that employed "authorization" by the companies involved following the removal by Barber for his own use. Customarily a donor initiates a gift. Ratification of a fait accompli is

far less likely to reflect a donative intent. The Hobbs Act counts did not involve either the perversion of the "breakage" system, nor did they involve the receipt of sums of cash delivered in plain white envelopes.

Hence, on the evidence, there was a fully adequate basis for a jury finding that the benefits accruing to Barber were not true gifts but rather were extracted, with the donors' consent, under color of official right.[3]

B. Mail Fraud

Barber contends that, with respect to the mail fraud counts, there was error both in the instructions to the jury and in the failure of the district judge to direct a verdict because of insufficiency

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[3]The jury was clearly entitled to find that the companies' motivation for authorizing the withdrawals focused on Barber's office. United States v. Price, 617 F.2d 455, 457-58 (7th Cir. 1979); United States v. Braasch, 505 F.2d 139, 151 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

of the evidence to convict. The asserted deficiency in the instructions derives from the claim that there was a need for greater precision in the description of the citizens' right to honest and faithful performance of the defendant's duties.[4] In the light of the matters charged, however, we are satisfied that the language employed clearly and unambiguously spelled out, in a fashion readily understandable, a correct statement of the law.

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[4]A scheme to defraud may result in a deprivation of tangibles such as revenue or of intangibles such as the honest and faithful performance of an official's duties. E.g., United States v. Pintar, 630 F.2d 1270, 1279-80 (8th Cir. 1980); United States v. Diggs, 613 F.2d 988, 998 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980); United States v. Brown, 540 F.2d 364, 374 (8th Cir. 1976). See also United States v. Mandel, 591 F.2d 1347, 1362-64 (4th Cir. 1979), vacated on other grounds by an equally divided court, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980). The falsification documentation utilized by Barber breached the fiduciary duty Barber owed to the state and its citizens. See, e.g., Pintar, supra, at 1280; Brown, supra, at 374-75.

Turning to the claim of insufficiency of the evidence, we note that the government contended that Barber devised a "scheme to defraud" and used the mails in carrying out the scheme, in violation of 18 U.S.C. § 1341. The falsity of the documents employed and the use of the mails have been convincingly established. Barber contends, however, that, since the companies were not misled by the "inaccuracies" in the withdrawal and breakage forms, no deception occurred. Two responses are in order. First, the use of he "breakage" system clearly involved deception, sicne notarized forms indicating unsalable merchandise, and, thus, unambiguously false, were sent to the liquor companies. That the companies recognized the deception is no defense to a charge that the scheme was employed to deceive. See, e.g., United States v. George, 477 F.2d 508, 512 (7th Cir. 1973), cert. denied,

414 U.S. 527 (1973) ("Since the gravamen of the offense is a 'scheme to defraud,' it is unnecessary that the Government allege or prove that the victim of the scheme was actually defrauded or suffered a loss."); United States v. Goldberg, 455 F.2d 479, 481 (9th Cir. 1972), cert. denied, 406 U.S. 967 (1972) ("It is not necessary to show that reliance of the victim was induced by misrepresentation of the defendant, nor it is necessary to show that the victim was misled.").

• Second, it is not just the liquor companies who were "deceived." The public, with a strong interest in upstanding conduct in the affairs of a state enterprise, and frustrated of opportunities to monitor those affairs because of the falsity employed, was also deceived by the utilization of forms disguising the true nature of the "breakage" and the "withdrawals."

Barber further asserts that, independently of whether they were deceived, there was no evidence that either the companies or the people of the state were harmed by the system. However, a scheme to defraud a state and its citizens of intangible rights, such as honest and faithful government, may fall within the purview of the mail fraud statute. See note 4, supra. In addition, while Barber recounts evidence that a majority of the companies considered the withdrawal practice to be a valid "promotional" device, there was also significant evidence that some company officials resented the defendant's excessive withdrawals.

Moreover, since many of the companies and officials had themselves been indicted and charged, and some of them convicted, it should not be surprising that they would continue to cry their innocence of wrongdoing from

the rooftops and deny that their respective companies were harmed--particularly if they might still be subject to shareholder suits.5

IV. RICO Count

The language of 18 U.S.C. § 1962(c) requires a showing of the "conduct" of the affairs of an enterprise "through a pattern of racketeering activity." United States v. Webster, 639 F.2d 174 (4th Cir. 1981), reheard by panel on

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[4]In any event, that one is forced into a "good" thing is not inconsistent with one's, as a consequence, being harmed, where the "good" thing is illegal, and, as a result, one is or may be convicted of crime. Most of the liquor companies were convicted of misdemeanor charges for giving gratuities for the very activities which led to prosecution of Barber. 27 U.S.C | 205(c). They, accordingly, were harmed.

That evidence was relevant and proper, in light of Barber's earnest endeavor to establish lack of harm to the companies. See United States v. Binger, 469 F.2d 275 (9th Cir. 1972).

October 9, 1981, has been modified with respect to the rules applicable to a § 1962(c) charge.

The modification has caused any force in an argument by Barber based on Webster to dissipate. The ABCC here, although its affairs were not "advanced" by Barber's activities, nevertheless submitted to the conduct of its affairs through a pattern of racketeering activity. The submission of the ABCC withdrawal and breakage documents was essential to the success of the scheme and clearly involved the conduct of the ABCC's affairs.

In light of our disposition of Barber's onslaught on the Hobbs Act violations, we need not devote attention to the unwarranted assertion that the requirement of "at least two acts of racketeering activity," 18 U.S.C. § 1961(5), was not satisfied.

V. Cross-Examination of Barber re His Resort to the Privilege Against Self-Incrimination

It needs no extensive discussion to establish that, without a good reason, one should not be asked about the invocation of the Fifth Amendment privilege. E.g., Doyle v. Ohio, 426 U.S. 610 (1976). but abstractions do not dispose of concrete cases. Here, Barber gave a justifiable reason to the prosecutors by testifying that, "had he been afforded the opportunity", he would have stated to the prosecutor his position on the matters in question before he was indicted.

That opened the door for the establishment of the fact that, upon being called before the grand jury, Barber pleaded the Fifth Amendment. We are not impressed by the quibble that he was ready to tell all to the prosecutor but not to the grand jury.

IV. Claim of Unfair Trial because of Jury Partiality

Juror Payne, on voir dire, after first stating that he had no opinion as to the guilt or innocence of the defendant, went on to say that "maybe" an impression that the defendant "might be"guilty had been created in his mind from reading the newspapers, but that he would make his decision from the evidence presented in the case. He explicitly denied having formed an opinion about the case. The trial court refused to strike Payne for cause, even though Juror McPherson was struck for cause when he stated that he had formed an opinion that defendant was innocent, but if the evidence presented should show defendant's guilt beyond a reasonable doubt, he could render a verdict in accordance with the evidence. He acknowledged, however, that his present feeling about the case would be difficult

to overcome. McPherson described himself "as firmly convinced" that what Barber was accused of had been going on for many, many years. He thought it all "a political affair," in which Barber was being made the scapegoat. His wife, he acknowledged, felt the same way.

In Irvin v. Dowd, 366 U.S. 717 (1961), the Supreme Court reversed a murder conviction where 8 of the 12 jurors admitted on voir dire that they thought the defendant guilty but that, notwithstanding their opinions, each thought he could render an impartial verdict. "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed

some impression or opinion as to the merits of the case. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id. at 722-23. It should be noted that in Dowd, the press had announced the defendant's confession of guilt to several of the murders involved.

On the facts of the present case, reversal is not indicated. It is one thing to say, as McPherson did, that his mind was made up, but he could, with difficulty, be persuaded to change it. It is quite another to say, as Payne did, that, with the saturation newspaper coverage to which those in the vicinity had been exposed, he might have been inclined towards a finding of guilt, but had put any such inclination aside and would consider the evidence as the only basis for his decision. The district judge, present in the courtroom, must

deal in inflections, nuances and evanescent impressions not preserved for an appellate bench. We do not regard the court's actions with respect to Jurors McPherson and Payne as inconsistent or as otherwise constituting an abuse of discretion. Exercising our duty to "independently evaluate the voir dire testimony of the impaneled jurors," Dowd at 723, we reach the same conclusion.

VII. Post-Verdict Refusal to Permit Defendant to Interview Two Jurors

Two jurors, independently of each other, indicated, after trial had been completed and the jurors had left the courtroom, that they were gravely disturbed by the verdict they had participated in reaching. Richard Kinney explained to the judge that he felt anguish over participation in the verdict. The next day he told the judge that he did not think Barber "should have been called guilty the way that he was."

Mrs. Hetta Hanshaw told a newspaper reporter that she had been threatened by the foreman of the jury to report her to the judge and that the foreman "scared [her] to death." The law is settled that, following dispersal of a jury, once it has been dismissed, if we allow such attacks by individual members on the composite verdict of all twelve we can expect an unsettling of the system out of all proportion to any expectable improvement in the administration of justice. See, e.g., McDonald v. Pless, 238 U.S. 264, 267-68 (1915); Rakes v. United States, 169 F.2d 739, 745 (4th Cir. 1948), cert. denied, 335 U.S. 826 (1948); 3. J. Weinstein & M. Berger, Evidence §§ 606[03],606[04] (1981).[6] The

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[6]Fed. R. Evid. 606(b) provides that a juror may not impeach the jury's verdict by testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to . . . the verdict."

opportunities for other abuses which would greatly exceed the possibly unfortunate consequences of not pursuing belated, post-verdict claims of intimidation by fellow jurors are obvious. In short, on the facts presented in the present case, the cure proposed is manifested worse than the hypothetical, but unproven, disease.

VIII. Juror Beulah James

Beulah James' brother, George McClaskie, had been tried and convicted of gambling in the district court. On voir dire, she indicated that she could reach an impartial verdict. However, the United States attorney failed to disclose to the defense that, at the sentencing of the juror's brother, he, the United States attorney, had spoken on the brother's behalf. Defendant contends that the information should have been revealed. The assumption that Barber would have us draw is that, while Beulah

James was probably not grateful to the government for prosecuting her brother, nevertheless she wanted to express her appreciation for the United States attorney's speaking in his behalf.

However, although it was in fact the same United States attorney, it appears that Beulah James did not know who it was who prosecuted her brother.[7] In short, nothing more than a potentially suspicious circumstance had been shown, and something more than such an unverified conjecture is required to justify grant of a new trial. See United

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[7]The United States attorney, at voir dire, asked the court to inquire "whether she knows which government lawyers were involved in the prosecution of George McClaskie." Mrs. James replied "No sir I don't."

She further replied that, if it should turn out that the United States attorney was the one involved, that would not prejudice her for or against the government.

Those were the last questions put to Beulah James on voir dire. Barber's counsel had no questions to ask of her.

States v. Hendrix, 549 F.2d 1225 (9th Cir. 1977), cert. denied, 434 U.S. 818 (1977); United States v. Mares, 383 F.2d 811, 812 (10th Cir. 1967), cert. denied, 390 U.S. 961 (1968) ("[A] showing of a possibility of prejudice . . . is not enough.").

AFFIRMED

APPENDIX B
DISTRICT COURT OPINION
HOLDING GOVERNMENTAL
OFFICE TO BE R.I.C.O. "ENTERPRISE,"
FILED AUGUST, 22, 1979

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

United States of America,
Appellee,

v. No. 79-20038

J. Richard Barber,
Appellant.

MEMORANDUM ORDER

This criminal action is before the court on the defendant's motion to dismiss the first count of the within indictment. Count One charges the defendant with one violation of Title 18, United States Code, Section 1962(c). Section 1962(c) is contained in Title IX of the Organized Crime Control Act of 1970 (hereinafter, the "Act"). Title IX is entitled "Racketeer Influenced and Corrupt Organizations" (hereinafter, "RICO").

Section 1962(c) states:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Defendant was at all material times Alcohol Beverage Control Commissioner for the State of West Virginia (hereinafter, "ABCC"). The ABCC is authorized by state law to supervise and control the wholesale and retail distribution of alcohol beverages in West Virginia. W. Va. Code § 60-3-1. Count One alleges that the operation of the ABCC affects interstate commerce, and that the defendant, as commissioner, conducted the affairs of the ABCC through a pattern of racketeering activity, as is more fully described in the indictment.

Defendant contends that a state agency or other governmental body does not constitute an enterprise as required by section 1962(c).[1] Defendant relies primarily on United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), aff'd in part, remanded in part, 591 F.2d 1347 (4th Cir. 1979, district court aff'd on rehearing, No. 77-2487 (July 20, 1979) (en banc), as well as the legislative history of RICO and the Act.

The court necessarily begins with the language of the statute. The term enterprise is expressly defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal

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[1]Defendant also argues in his motion to dismiss Count One that the RICO statute is unconstitutional for a number of reasons. Those alleged constitutional infirmities have been heretofore rejected by the court on the record of prior proceedings in the case.

entity." 18 U.S.C. § 1961(4). The statutory definition thus stretches from the specific to the broad, general term "other legal entity," to the even greater informality of persons merely associated in fact.

The ABCC is a legal entity, and consequently comes within the literal meaning of enterprise. Established by section 60-2-1 of the West Virginia Code, the ABCC has authority to enter into contracts for the leasing of buildings and the purchase of equipment, to employ personnel, and to otherwise carry out the duties attendant to the purchase, sale, and distribution of alcoholic beverages. See W. Va. Code §§ 60-2-11, 60-2-12.

It is arguable that the more specific language "any individual, partnership, corporation, association" in section 1961(4) limits the meaning of the subsequent term "other legal entity" through application of the doctrine of

ejusdem generis. Whether or not it is appropriate to utilize ejusdem generis here to circumscribe the otherwise broad definition in the statute requires an analysis of the congressional purpose.

The Statement of Findings and Purpose in the Organized Crime Control Act summarizes the breadth of the problem or organized crime, and the intense congressional concern to combat it:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as

syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and is citizens; and (5)

organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing

enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Pub. L. No. 91-452, § 1, 84 Stat. 922.

Recurrent themes running throughout the legislative history include the diversity of organized crime, its penetration into virtually every phase of the nation's economic and political life, the infiltration of, and dependency upon, political institutions by persons engaged in organized crime, and the ineffectiveness of past enforcement efforts. Senator Hruska of Nebraska, a member of the Subcommittee on Criminal Laws and Procedures which drafted and introduced the bill, made the following comments during the initial Senate debates:

In recent years, organized crime has become increasingly diversified and has become entrenched in legitimate businesses and in labor unions where it employs terrorism, extortion, tax evasion, bankruptcy fraud and manipulation, and other measures to drive out lawful owners and officials. Also, wherever organized crime exists, it corrupts public officials and wields extensive political influence which insulate its activities from governmental interferences.

Corrupt officials and bribed law enforcement officers operate as "a silent conspiracy" in support of organized crime. The syndicate could not continue

> to operate without corrupt judges and prosecutors, or without the assistance of a handful of bribed police.

116 Cong. Rec. 601 (1970). Senator Byrd of West Virginia echoed the concern expressed by his colleague:

> A study for the President's Crime Commission, still secret, reportedly details the infiltration of organized crime into local, State and Federal Government, including, it is said, the control of several Federal district judges.
>
> These recent revelations are simply a further indication that we are suffering from a bad case of moral rot and that we are allowing our cherished democratic institutions to

> crumble before our eyes. I hope the revelations will serve to shock some of our more complacent citizens into an awareness of the magnitude of the problem.

Id. at 606. The House debates contain similar comments:

> The danger of organized crime arises because the vast profits acquired from the sale of illicit goods and services are being invested in licit enterprises, in both the economic sphere and the political sphere. It is when criminal syndicates start to undermine basic economic and political traditions and institutions that the real

> trouble begins. And the real trouble has begun in the United States.

Id. at 35199 (remarks of Rep. St. Germain).

Congress responded to this unanimous sense of urgency by enacting a comprehensive scheme incorporated in twelve separate titles. The first ten titles were capsulized by Senator McClellan, chairman of the Subcommittee on Criminal Laws and Procedures, during his presentation of the bill to the Senate:

> Mr. President, the product of this process is a bill which has been carefully drafted to cure a number of debilitating defects in the evidence-gathering process in organized crime investigations [Titles I-VI], to circumscribe defense abuse of pretrial proceedings

> [Title VII], to broaden Federal jurisdiction over syndicated gambling and is corruption where interstate commerce is affected [Title VIII], to attack and to mitigate the effects of racketeer infiltration of legitimate organizations affecting interstate commerce [Title IX], and to make possible extended terms of incarceration for the dangerous offenders who prey on our society [Title X].

Id. at 585.[2]

The legislative history thus illustrates the broad congressional perspective and sweeping determinism from which Title IX originated.

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[2]Title XI, "Regulation of Explosives," and Title XII, "National Commission on Individual Rights," were added by the House Committee on the Judiciary to the

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It is equally clear that at the time the Act was being considered by each house of Congress, the legislative target was the organized criminal syndicate. The Act does not, however, define "organized crime." Moreover, the following titles in the Act are applicable to any criminal proceeding without limitation or reference to traditional notions of organized crime: Title II, providing a procedure whereby the government may request court-ordered use immunity for a witness, 18 U.S.C. § 6001, et seq.; Title III, permitting the court to incarcerate a witness who refuses to comply with a subpoena or other court order, 28 U.S.C. § 1826; Title IV, prohibiting false declarations before a grand jury or court, 18 U.S.C. § 1623; Title VII, restricting hearing and disclosure requirements in instances where a defendant alleges unlawful electronic

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original Senate bill. 1970 U.S. Code Cong. & Ad. News 4007.

surveillance, 18 U.S.C. § 3504; Title VIII, prohibiting illegal gambling, 18 U.S.C. § 1955; Title IX, prohibiting racketeering activity and providing criminal and civil proceedings and remedies to eliminate it, 18 U.S.C. §§ 1961-68; Title X, providing increased sentences for "dangerous special offenders," 18 U.S.C. §§ 3575-78; and Title XI, regulating the manufacture and distribution of certain materials classified as explosive, 18 U.S.C. §§ 841-48.

Congress was aware that the application of these various legislative proposals extended beyond syndicated crime. Attempts to include a definition of "organized crime" or otherwise confine the Act to is genesis were however specifically rejected. In response to the challenge that the bill was overreaching, Rep. Poff, a member of the House Judiciary

Committee which considered and reported the proposed Act, made the following comment:

> The gentleman [Rep. Mikva] inquired rhetorically as to why no effort was made to define organized crime in this bill. It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant? Would he not be the first to object to such a system?

116 Cong. Rec. 35204. At a later point in the debates, Rep. Poff elaborated upon the Committee's position:

> The curious objection has been raised to S. 30 [the proposed Act] as a whole, and to several of its provisions in particular, that they are not somehow limited to organized crime--as if organized crime were a precise and operative legal concept, like murder, rape, or robbery. Actually, of course, it is a functional or sociological concept like white collar or street crime, serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

Nevertheless, this line of analysis has a certain superficial plausibility. But if we make a closer examination we see that it is seriously defective in several regards. Initially, it confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new lesson derived from that reexamination. For example, our examination of how organized crime figures have achieved immunity from legal accountability led us to examine the sentencing practices and powers of our Federal courts. There we found that now our Federal judges, unlike State judges, have no statutory power to deal with organized crime leaders as habitual offenders

> and give them extended prison terms. Havig noted the lack of habitual offender provisions by considering one class of cases, we obviously learned that it was lacking on other classes, too. Is there any good reason why we should not move to meet that need across the board?

Id. at 35344.

These comments, and others in the legislative history not specifically cited, demonstrate two relevant points: first, Congress was focusing is efforts upon certain criminal activity often associated with criminal syndicates, but was not attempting to define or isolate the participants in organized crime, or otherwise restrict the applicability of the Act's provisions. See United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977); United States v. Mandel, 415

F.Supp. 997, 1018-19 (D. Md. 1976). Secondly, Congress undoubtedly perceived the problem as one of magnitude and diversity, and determined to leave as few enforcement gaps as possible where in fact the criminal activity exits, as defined in the Act.

The court concludes that Congress did not intend to limit the plain meaning of the words "other legal entity" in the statutory definition of enterprise. The doctrine of ejusdem generis "is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. . . . [I]the may not be used to defeat the obvious purpose of legislation. And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view." Gooch v. United States, 297 U.S. 124, 128 (1936), quoted in United States v. Alpers, 338

U.S. 680, 683 (1950). To interpret "other legal entity" to include only organization similar to those specified in the statutory definition would impermissibly confine the scope of the congressional intent. As noted by the Third Circuit Court of Appeals in United States v. Frumento, 563 F.2d 1083 (1977), cert. denied, 434 U.S. 1072 (1978), "Congress intended the general words defining an 'enterprise' in § 1961(4) to go beyond the specific reference to private business or labor organizations." Id. at 1090.

Defendant urges, however, that Congress simply did not intend to include state or public entities within the definition of enterprise, citing United States v. Mandel, 415 F.Supp. 997 (D. Md. 1976). In Mandel, the district court held that the State of Maryland was not an enterprise within the meaning of section 1962(c), and accordingly dismissed Count 22 of the indictment. Count 22 charged

the defendant Mandel with "conducting and participating in the affairs of the State of Maryland, which is alleged to be an enterprise within the meaning of the statute, through the same pattern of racketeering activity [alleged in earlier counts]." Id. at 1018.[3]

The Mandel court, in a well written opinion, found that (1) Title IX's major purpose was to "rid racketeering

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[3]On appeal, the government did not assign as error the dismissal of Count 22. 591 F.2d 1347 (1979). The Fourth Circuit Court of Appeals thus did not consider in its review of the Mandel case whether a state or public entity may be an enterprise for purposes of a RICO violation.

The court notes parenthetically that the Fourth Circuit upheld the conviction of a police officer charged under section 1962(c) with receiving bribes in return for the protection of illegal night clubs and gambling operations. The enterprise in that case was the police department vice squad for the county of Charleston, South Carolina. United States v. Burnsed, 566 F.2d 882 (4th Cir. 1977). However, apparently the defendant in Burnsed did not argue the enterprise issue presented in Mandel, and raised by the defendant here. The question remains open in this district.

influences from the commercial life of the nation" as evidenced by the legislative history; (2) governmental entities were never discussed during congressional consideration of Title IX; (3) the civil and criminal remedies in section 1963 were appropriate only for private entitles; (4) the policies and concerns underlying Title IX were inapplicable to public bodies; and (5) the doctrine of ejusdem generis limited the meaning of enterprise to the kinds of private entities specifically named in the statutory definition. Id. at 1020-21. The court thus implied from these findings that Congress did not intend to include governmental or public entities in the definition of enterprise for purposes of section 1962.

The analysis of the Mandel court has some force. The legislative history for Title IX is replete with references to businesses and labor unions, and the economic effects of criminal infiltration

in various industries. Governmental bodies or agencies were never addressed specifically in the context of Title IX, although Congress repeatedly expressed grave concern over the deterioration of our democratic institutions through the infiltration of organized crime, as is evident from the earlier discussion.

Upon careful review of the legislative history of Title IX and an examination of the Act as a whole, it appears inappropriate to interpret Congress' silence as an exception for all public entities. The court hesitates to carve out such a broad exemption where there is no positive basis in the legislative history for so doing, but only a negative inference from the absence of specific congressional consideration. Where Congress did not expressly address an issue, "the court must discern the applicable legislative intent by what is necessarily an act of projection--starting

from the areas where the legislative intent is readily discernible, and projecting to fair and reasonable corollaries of that intent . . .." Montana Power Co. v. Fed. Power Com'n, 445 F.2d 739, 746 (D.C. Cir. 1970) (en banc), cert. denied, 400 U.S. 1013 (1971), supp'd 459 F.2d 863, cert. denied, 408 U.S. 930 (1972). As discussed supra, Congress intended through the ten titles of the Act to strengthen enforcement against certain criminal activity; the fact that a public vehicle is allegedly used to perpetrate that activity should not, it seems, automatically immunize a defendant from RICO sanctions.

The court's reluctance to exempt public entities from Title IX liability is not altered by the criminal and civil remedies provided therein. Section 1963(a) states that:

> Whoever violates any provision of section 1962 of this chapter shall be fined not more that $25,000 or imprisoned not more

> than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kid affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

Section 1964(a) authorizes the district court to enter appropriate orders following civil proceedings instituted by the United States:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities which affect interstate or foreign commerce; or ordering dissolution or reorganization of

> any enterprise, making due provision for the rights of innocent persons.

And section 1964(c) provides that any person whose property or business is injured by a violation of section 1962 may seek treble damages for any loss sustained.

The district court in Mandel concluded that "the civil and criminal provisions clearly imply that Congress had only private entitles i minds [sic] when defining 'enterprise.'" 415 F.Supp. at 1021. The Mandel court perceived the remedies as creating impossible and improper results if applied to a state entity:

> The criminal penalties include find, imprisonment and forfeiture; the civil penalties, modeled on the antitrust statute, provide for private treble damage actions and such injunctive relief as divestiture and forfeiture. It could hardly be contended that a private citizen of a state, aggrieved by the "racketeering acts" of an official in conducting the state, could bring a treble damage action

> against that official and require forfeiture of office and dissolution of the state government. The interpretation of this statute to include "states" within the meaning of "enterprise" would clearly result in what could only be characterized as a startling departure from the traditional understanding of federal-state relationships. Unless Congress has clearly indicated its intentions to "alter sensitive federal-state relationships", courts should be reluctant to give ambiguous phrases within a statute that effect.

Id.

This court does not share the suggestion in Mandel that a private treble damage action against a public official engaged in racketeering activity is inconceivable under RICO. It is apparent however that where a state is the alleged enterprise, as in Mandel, dissolution is unthinkable and forfeiture of office impracticable if not constitutionally impermissible. On the other hand, the dissolution and forfeiture provisions, intended as they were to "free the

channels of commerce from all illicit activity," S. Rep. No. 91-617, 91st Cong., 1st Sess. 79 (1969), are clearly appropos where private businesses have been criminally infiltrated.

Irrespective of these distinctions, divestiture and civil forfeiture are discretionary sanctions to be used by the government and the court to fashion adequate remedies. See United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974). There is no binding correlation between Title IX's remedial options and the question of whether Congress intended to omit public entities from the meaning of enterprise. In fact, this panoply of remedies reinforces the court's conclusion that Congress perceived its target as broad and diverse. The criminal and civil penalties in sections 1963 and 1964 support the undisputed fact that congress intended to combat takeovers of private businesses through illegal activity. It

by no means follows that, had Congress specifically addressed the question, it would have excluded public entities from the substantive provisions of section 1962.

Two circuit courts of appeals have concluded that a public entity may be an enterprise. In United States v. Brown, 555 F.2d 407, 4y (5th Cir. 1977), the Fifth Circuit held that the Macon, Georgia, police department is an enterprise. The court observed that the statutory language defining enterprise is broad and, on its fact, makes no distinction between the public and private sector. Id. at 415. The court relied upon the congressional statement of findings and purposes, quoted supra at page 3, to conclude that "Congress was concerned with the impact of organized crime on the entire democratic process itself." Id. at 416.

The Third Circuit Court of Appeals reached a similar conclusion. In United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977), the court held that the Bureau of Cigarette and Beverage Taxes, an agency of the Commonwealth of Pennsylvania, constitutes an enterprise. As noted earlier, the Frumento court rejected the application of ejusdem generis to limit the definition of enterprise. The opinion contains strong language describing Congress' intent:

> As we read the Organized Crime Control Act, Congress was not so much concerned with limiting the protective and remedial features of the Act to business and labor organizations as it was with reducing the insidious capabilities of persons in organized crime to infiltrate the American economy.
>
> . . .
>
> In other words, Congress' concern was enlarging the number of tools with which to attack the invasion of the economic life of the country by the cancerous influences of racketeering activity; Congress did not confine its scrutiny to special areas of economic activity. Congress had no

> reason to adopt a constricted approach to the solution of the problem. Congress was concerned with the infiltration of organized crime into the American economy and to the devastating effects that racketeering activity had upon it. Yet, we are asked to believe that Congress' approach to a monumental problem besetting the country was myopic and artificially contained. Is it conceivable that in considering the ever more widespread tentacles of organized crime in the nation's economic life, Congress intended to ignore an important aspect of the economy because it was state operated and state controlled? We think not.

Id. at 1090-91 (footnotes omitted). The forcefulness of the Third Circuit opinion in Frumento reflects the vigor of the legislative history.

Of particular relevance to the present case is the following comment by the Frumento court:

> [I]n Pennsylvania the Commonwealth is engaged in several of the largest and more affluent business operations in the state, each of which involve many millions of dollars. The Commonwealth of Pennsylvania purchases, distributes, and sells

> alcoholic beverages legally consumed among its more than 12,000,000 citizens; it sells and distributes games of chance through its much touted lottery system. The constricted reading of the statute advocated by the appellants makes little sense; private business organizations legitimately owned and operated by the states, even though their activities substantially affect interstate commerce, would be open game for racketeers.

Id. at 1091 (footnotes omitted).

The State of West Virginia is in the business of buying and selling alcoholic beverages through the ABCC. The ABCC is involved in the importation of liquor across state lines for distribution in West Virginia and enjoys a state-protected monopoly. If the industry were privately-owned, it would unquestionably be an enterprise as defined in Title IX. To exempt state-owned and state-operated businesses from the meaning of enterprise on the basis of their public ownership seems an artificial distinction.

Moreover, the resultant loophole contradicts the express purpose of Title IX and the Act.

Finally, the court notes the following observation in the Mandel opinion:

> [A]the least part of Congress' concern in enacting Title IX of the Organized Crime Control Act was to enable the relatively small businessman operating in interstate commerce, who was most in need of protection from the criminal tactics of an interstate network of racketeers, to invoke the protection of the federal laws.

415 F.Supp. at 1021. The Mandel court characterized the threat of racketeering by state officials as a matter of local concern, adequately and more properly controlled by state law. Id. Yet, it is clear from the Act and the legislative history that Congress believed racketeering activity to be a problem of national scope, and in need of federal

enforcement. The small businessman was merely one of the persons and institutions whom Congress intended to protect.

It should also be observed that the government must prove as an element of a Title IX violation that the enterprise in question affects interstate commerce. The activity charged in the indictment as unlawful must, through operation of the enterprise, affect commerce beyond the parameters of the state. In the present case, the ABCC imports alcoholic beverages from foreign corporations, who in turn allegedly participated in the alleged racketeering activity. Neither the Mandel court nor the defendant here questions Congress' authority pursuant to the Commerce Clause to take action in this area. Thus this court, while doubting the accuracy of describing the issue as one of "primarily local concern," id. at 1021, concludes in any event that Congress did

not perceive it as such, and that an interstate relationship is constitutionally mandated.

Insofar as the district court in Mandel may have found a broad exception from Title IX for all public entities, this court respectfully declines to follow that decision. However, whether or not a state, as in Mandel, is an enterprise for purposes of a section 1962 violation is a question the court need not, and does not, reach. The court holds today, following a review of the statutory language, the various provisions of the Act, the legislative history, and the case law, that a state agency in the business of wholesaling and retailing alcoholic beverages is an enterprise as that term is defined in section 1961(4).

This opinion does not, of course, indicate any views as to the merit of the government's allegations, nor does it hint at any connection whatsoever between this

defendant and the amorphous concept of organized crime. The court concludes only that Count One of the indictment is legally sufficient on is face to withstand pre-trial attack.

Accordingly, it is ORDERED that defendant's motion to dismiss Count One of the indictment be, and the same hereby is, denied.

The Clerk is directed to serve upon counsel of record and the defendant certified copies of this order.

ENTER:

JOHN T. COPENHAVER, JR.
United States District Judge

APPENDIX C

DISTRICT COURT'S ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE GOVERNMENT'S GRANT OF IMMUNITY TO PETITIONER.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
v. Criminal No. 79-20038
J. RICHARD BARBER

Before: THE HONORABLE JOHN T. COPENHAVER, JR., United States District Judge, on July 6, 1979, at Charleston.

THE COURT: Turning now to the motion to dismiss on immunity grounds, the Court's findings of fact and conclusions of law on that motion are as follows:

The defendant, Richard Barber, was interviewed by an agent of the Federal Bureau of Investigation on September 17, 1975. The interview related primarily to

(1) Whether the defendant had obtained any cash contributions during the 1972 gubernatorial campaign from liquor company representatives or others,

(2) to whom any such contributions were by him delivered, and

(3) such knowledge as he might have respecting campaign financing in Logan and Kanawha counties.

The government had reason to believe that at least some of the defendant's statements were not true and, accordingly, subpoenaed the defendant in early December, 1975, for an appearance before the grand jury for the purpose of questioning the defendant as to the truthfulness of his September interview and in order to ascertain the extent to which cash moneys passed through the personal care of the governor during the 1972 election campaign.

Evidence with respect to such cash moneys was apparently being developed, first, in conjunction with the grand jury investigation leading to the indictment in the case of United States v. Moore and Loy, which was returned on December 18,

1975, and, secondly, for its intended use by the government in connection with the trial of that case.

The defendant appeared in response to the subpoena with his attorney, Rudolph L. Di Trapano, on December 11, 1975. Prior to the defendant's appearance before the grand jury, United States Attorney Field expressly assured the defendant and his attorney that the defendant would not be prosecuted for false swearing to an FBI agent if he would tell the truth about the matters as to which he had earlier been interviewed on September 17, 1975. The government's assurance was a promise constituting the equivalent of transactional immunity as to the potential false swearing charge.

At the same time, United States Attorney Field implicitly assured the defendant and his attorney that the defendant's responses to questioning on December 11, 1975, by government agents

and the grand jury would not be used against him either directly or through leads gained therefrom.

In this connection, it has been the acknowledged practice of the United States Attorney's office in this district for a substantial period of time down through December, 1975, to render Miranda warnings at least to all individuals coming before the grand jury thought to be subjects or targets of grand jury investigations.

In response to the concern expressed by the defendant's attorney that the defendant not be placed in jeopardy by reason of a grand jury appearance, the United States Attorney indicated that the defendant need not be concerned because the United States Attorney was not going to give the Miranda warnings to the defendant.

Under all the attendant circumstances, and notwithstanding the questionable legal effect of the failure

to give the Miranda warnings, the offer by the United States Attorney was reasonably perceived and accepted by the defendant and his counsel as being a proffer of use immunity with respect to such responses as the defendant might truthfully make to questions addressed to the defendant both in the interview shortly before his grand jury appearance and while the defendant was before the grand jury on December 11, 1975.

The defendant and his counsel reasonably understood, believed and were justified in their belief that the defendant would not be in jeopardy by reason of his appearance and truthful testimony before the grand jury, as well as the immediately preceding interview with United States Attorney Field on December 11, 1975.

The government is, therefore, deemed to have promised use immunity accordingly. The defendant accepted the government's

offer and, in reliance thereon, testified freely in answer to the questioning of the government agents and the grand jury in keeping with the assurances expressly and impliedly given.

The time scope of the grand jury testimony and the December interview embraced the period from July, 1972, to election day in early November, 1972, and related to the following:

1. Fund raising activities, involving the general source and amount of funds collected for campaign purposes by the defendant Barber and the parties to whom Barber delivered the funds so collected by him.

2. Courier activities, involving the source, amount and recipient of campaign funds received and delivered by Barber in various southern West Virginia counties.

The United States contends that none of the interview information or grand jury testimony has been utilized by the government either in any phase of its investigation relating to the indictment in this case or in preparation for trial. Apparently the grand jury transcript of defendant Barber's testimony was not properly indexed and as a result was not known to exist until late June, 1979.

The interviews, however, were known to exist by the government attorneys and agents investigating this case at least as early as the summer of 1978. United States Attorney King, who has been in charge of the investigation leading to this indictment, has neither been aware of nor relied on the grand jury testimony and, although aware of the interviews for perhaps a year, has made no use of them in connection with this case.

However, there are a number of other government attorneys, FBI agents and Alcohol, Tobacco and Firearms agents who have been involved in the events leading to this indictment. Those events may have commenced about November, 1976, at the time of a three or four-week records examination by an ATF agent in the office of the West Virginia Alcohol Beverage Control Commissioner which was then occupied by the defendant Barber. This was followed by a further examination by ATF agents in April or May, 1977.

Although an official file was not opened on the investigation in the United States Attorney's office for this district until January, 1978, it is noted that the November, 1976, examination by the ATF agent came just eleven months after the Barber appearance before the grand jury and just six months after the acquittal in the Moore trial.

The Court does not question the responses of United States Attorney King, all of which have surely been made in good faith. Nevertheless, the investigation in this case has been of such breadth and has involved so many other government agents and attorneys as to compel the conclusion that the government has not yet met its burden of proving a legitimate, independent source for such evidence as it may have respecting the cash items alleged to have arisen during the 1972 gubernatorial campaign from July to November of that year, as well as such other phases of the case, if any, as may also be the subject of leads gained from the interview and grand jury testimony of December 11, 1975.

Accordingly, the motion to dismiss on immunity grounds is denied as to all counts insofar as it seeks dismissal of the indictment. However, further hearing will be held to determine the extent of

which the government's evidence is deemed derived from legitimate, independent sources.

APPENDIX D

DISTRICT COURT'S ORAL FINDINGS OF FACT REGARDING THE GOVERNMENT'S USE OF PETITIONER'S IMMUNIZED TESTIMONY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
v. Criminal Action No. 79-20038
J. RICHARD BARBER

Before: THE HONORABLE JOHN T. COPENHAVER, JR., United States District Judge, on the 2d day of October 1979, at Charleston.

THE COURT: Before proceeding with sentencing, the Court at this time, in support of its admission into evidence in this case of various items of evidence to which objection was made as arising out of immunized testimony, makes the following supportive findings of fact in connection with its admission of that evidence.

The investigation that ultimately led to the indictment in this case was initiated by the Central Region of the Bureau of Alcohol, Tobacco and Firearms, following an examination by ATF agents of records in the office of the West Virginia

Alcohol Beverage Control Commissioner in December, 1976, with respect to activities of William Grant & Son.

This examination was conducted out of the office of the ATF Central Region which includes West Virginia and is headquarters in Cincinnati. It was carried out at the request of the ATF Middle Atlantic Region, headquartered in Philadelphia. The Middle Atlantic Region, which then had William Grant & Son under investigation with respect to the expense accounts of its liquor salesmen, requested the Central Region to examine the records of the West Virginia Alcohol Beverage Control Commissioner regarding similar matters involving William Grant & Son's activities in West Virginia.

During the course of its West Virginia examination in December, 1976, ATF discovered the existence of a so-called withdrawal system of doubtful legality in which not only William Grant &

Son had engaged, but so, too, had many of the distilleries who sold to the West Virginia Alcohol Beverage Control Commissioner. As a result, Edwin Townsend, Area Supervisor for the Central Region, commenced what was termed the West Virginia ABCC investigation because it pertained to so many other distilleries.

The continuation of the ATF investigation of liquor industry practice in West Virginia was encouraged by the efforts of Patrick Boggs, who succeeded the defendant, J. Richard Barber, as ABC Commissioner in early 1977. Boggs met with the Chief of Field Operations for the Central Region in November, 1977, for the purpose of urging that the investigation be proceeded with.

In addition, information received by ATF from Seagrams in 1977 under the ATF Voluntary Disclosure Program indicated certain questionable practices on the part of Seagrams, including $100,000 in

improper withdrawals from 1972 to 1976, which merited further investigation in West Virginia.

Apparently little was done in connection with the ABCC investigation by ATF until October, 1977, following which ATF agents Schuster and Sullivan interviewed a number of ABCC personnel in December, 1977, relative to the withdrawal system which utilized ABCC Form 180's for straight withdrawals and Form 25's for breakage affidavit withdrawals.

These activities culminated in a meeting between ATF agents and the office of the United States Attorney for the Southern District of West Virginia on January 13, 1978. As of that meeting, the investigation was headed up by the United States Attorney's office. At the same time, ATF informed the United States Attorney relative to the Seagrams $100,000 in withdrawals.

That meeting was followed by a meeting in Washington on March 7, 1978, between ATF representatives and the United States Attorney and members of his staff with respect to the so-called West Virginia situation involving the distilled spirits industry and the withdrawal system.

At the March meeting, ATF Director Rex Davis informed United States Attorney King and Assistant United States Attorney Rich of the Voluntary Disclosure Program and the indication of illegal payments that had been made by distilleries in controlled states.

The ATF representative suggested that this was an area that should be examined in West Virginia. Moreover, similar information respecting Seagrams, as has already been indicated, had been given in the earlier January 13, 1978, meeting.

Between these two meetings in January, 1978, and March, 1978, the United States Attorney's office directed those participating in the investigation to look not only for abuses of the withdrawal system, involving the giving or receiving of free liquor, but also inducements of any kind to or from anyone, including cash, whether in the form of gratuities, kickbacks, political contributions, or otherwise. The suggestion that cash or its equivalent be inquired into was simply the product of the good judgment any prosecutorial authority would be expected to make in the pursuit of a comprehensive investigation of the kind already under way in this instance.

In March, 1978, the Federal Bureau of Investigation opened its own file on a matter related to this same investigation. Arthur Nehrbass of the Pittsburgh FBI

office began receiving information relative to corruption in the liquor industry in Pennsylvania.

At the end of January or early February, 1978, Nehrbass, knowing the West Virginia system to be similar to that of Pennsylvania, learned from the Securities & Exchange Commission on March 9, 1978, of the basis for a similar investigation in West Virginia in that the SEC had advised that Seagram's West Virginia representative, Joe Prino, had given information indicating the need for such an investigation. Prino, an uncle of the defendant, was subsequently interviewed by FBI agent Calvin Knott on or about April 24, 1978. Prino indicated no knowledge of kickbacks or cash payments.

On April 7, 1978, FBI agent George Adams began participation in the joint investigation by ATF and the United States Attorney's office, working under the direction of the United States Attorney.

The scope of that investigation embraced not only the withdrawal system, but cash payments and gratuities in any form, including political contributions.

In the course of the FBI investigation, Chester Spencer, an agent of Hiram Walker, gave statements in March and April, 1978, respecting cash payments and gratuities made to or for the benefit of the defendant and, on occasion, his wife, as well as improper withdrawals.

As a result of the Spencer statements, Assistant United States Attorney Wayne Rich caused a subpoena duces tecum to be issued under date of May 5, 1978, directing the authorized records custodian of Hiram Walker, Inc. to appear before the Grand Jury at Charleston, West Virginia, on May 18, 1978, with records, writings and the like for the period from 1969 to 1978 relating, among other things, to "any and all bribes, kickbacks, business expenses, entertainment,

transportation, gifts, gratuities, campaign, or political contributions, or any thing or things of value, paid on behalf of or delivered to any officer, official, employee, or a member of the family of any such officer, official, or employee, of the State of West Virginia, directly or indirectly, excluding records which relate solely to sales of alcoholic beverages to the State of West Virginia."

The subpoena duces tecum also sought ABCC Forms 180 withdrawal records. The subpoena, which was some two weeks in preparation, was finally completed on its date. May 5, 1978. The command of the subpoena for records pertaining to gratuities, cash and political contributions was drafted at an early stage of the subpoena request by virtue of the Spencer statement of April 20, 1978.

On May 3, 1978, FBI agent Adams made a routine request for a search of the FBI files in Pittsburgh for any statements

pertaining to the matters under investigation. On May 5 or 6, 1978, agent Adams received the two FBI interviews with the defendant of September 17, 1975, and December 11, 1975.

Neither of these interviews nor any of the information contained therein came to the attention of Assistant United States Attorney Rebecca Betts prior to her ascertaining on May 18, 1978, that Hiram Walker, through its agent Herbruck, had made a $1500 cash political contribution that was delivered to the defendant.

Similarly, Assistant United States Attorney Wayne Rich learned of the defendant's political contribution involvement for the first time as a result of the Herbruck admission on May 18, 1978, it being further noted that Ms. Betts was the first to so learn of that $1500 cash political contribution, that is, among the government agents.

In preparation for the May, 1978, session of the Grand Jury, as well as those sessions of the Grand Jury to follow with respect to this investigation until return of the indictment in this case on May 1, 1979, the investigators caused to be subpoenaed witnesses and records by reference to the Forms 180 uncovered by the ATF agents during the course of their examination of the ABCC records in late 1977 and by reference to the 1977 Yearbook of the National Alcoholic Beverage Control Association, the West Virginia Blue Book and lists provided by the West Virginia Alcohol Beverage Control Commissioner or his agents and employees to ATF agents in December, 1977, wherein the names of various distilleries were to be found. The testimony and records so obtained in turn led to further evidence utilized in obtaining the indictment and for trial purposes.

Although the FBI interviews of September 17, 1975, and December 11, 1975, were made available to certain of those involved in the investigation at sometime on or after May 5, 1978, the information contained therein was neither needed nor utilized by those involved in the investigation which ultimately led to the indictment in this case and the subsequent trial.

Moreover, the investigation had already focused upon political contributions prior to the awareness of he existence of the FBI interviews by any government agents involved in the investigation.

Further, the defendant's Grand Jury testimony of December 11, 1975, was unknown to an of those involved in the investigation until its discovery after the indictment was returned in this case. In this connection, the fact of the defendant's appearance before the December

1975 Grand Jury was misindexed and was not located until the defendant's motion for a transcript thereof was made after the indictment was returned in May, 1979.

Accordingly, the Court finds and concludes that no part of the government's case nor any evidence utilized in connection with obtaining the indictment, the preparation trial, or the trial itself has stemmed from the 1975 FBI interviews and Grand Jury testimony of the defendant in this case or any leads gained therefrom. All such evidence so utilized by the government was derived from plainly legitimate sources, wholly independent of the immunized testimony and fruits thereof.

Moreover, neither the subject matter of the investigation nor the defendant's involvement therein was in any manner or measure focused upon by virtue of the immunized statements and testimony or the

fruits thereof, but was similarly the result of evidence obtained from legitimate and wholly independent sources.

APPENDIX F
STATUTES INVOLVED

MAIL FRAUD, 18 U.S.C. § 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is

addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

THE HOBBS ACT
[INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE], 18 U.S.C. § 1951:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty, years, or both.

(b) As used in this section --

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or

threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through

any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

R.I.C.O.
[RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS], 18 U.S.C. §§ 1961-1963:

§ 1961. Definitions

As used in this chapter --

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any

of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953

(relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling,

or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this

chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator"means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of

any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in,

or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities in any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an

unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in

connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as

applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

APPENDIX G

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED MARCH 19, 1982.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 79-5279

United States of America,
versus
J. Richard Barber,

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Butzner and Judge Ramsey (U.S.D.J.)

For the Court,

/s/ William K. Slate, II

CLERK

APPENDIX H
EXCERPTS FROM TRIAL TRANSCRIPT

Questioning of the Petitioner:

Q.: Mr. Barber, isn't it a fact that you were given an opportunity to appear before the grand jury investigating this case?

A: Yes, sir.

Q: And isn't it a fact, Mr. Barber, that you declined to appear?

A: On advice of counsel.

Q: Isn't it a fact, Mr. Barber, that you declined to appear?

* * [objection overruled] * *

A: Yes, on advice of counsel.

Q: You refused to appear before the grand jury, did you not?

A: Yes sir, on advice of counsel.

Q: Sir, the fact of the matter is you haven't explained anything to the government until today. Isn't that correct?

* * [objection sustained] * *

Q: Mr. Barber, it is a fact, is it not, sir, that you have never discussed with my office or the grand jury the withdrawal system or the breakage system with respect to liquor coming out of the warehouse?

A: Yes, sir, that's a fact. [Trial transcript, pp. 1615-1618]

Testimony of the liquor company representatives

1. Testimony regarding the withdrawal system

Testimony of John Manning, Renfield Importers :

Q: You never felt any kind of compulsion or threat or anything about those whatsoever, did you?

A: None whatsoever. [Id., p. 348]

Testimony of Blaine Peterson, American Distilling Company and Schenley Affiliated Brands :

Q: You felt no compulsions, no threats, no intimidation about those form 190's, did you?

A: No.

Q: None. Did you?

A: That's right. [Id., p. 654]

Testimony of William Hobart Booth, Joseph T. Seagram & Sons :

Q: Did you feel you had to give it to him or you had to make that [liquor] available for his use simply because he was the state ABCC Commissioner?

A: No. I just wanted to get it exposed.

Q: Did he ever indicate to you ... by words, by expression, by intimation, that he was expecting something for your right to do business in the State of West Virginia?

A: No, sir.

Q: Did he treat you, Mr. Barber, with meticulous honesty in every transaction you had with the State of West Virginia?

A: Yes, sir. [Id., pp. 1088-1090]

Testimony of John Saladini, Joseph T. Seagram & Sons:

Q: Isn't it true, that in your dealing with Mr. Barber he never at any time asked you for alcoholic spirits for his own use as a cost of your being able to do business in the State of West Virginia?

A: No.

Q: Did he ever expressly or impliedly ... exact from you any tribute to do business in the State of West Virginia?

A: Never.

Q: Isn't it a fact ... that in all his transactions with you he was meticulously honest and meticulously fair?

A: Very true. [Id., p. 1144]

Testimony of Richard Burke, Heublein, Inc. :

Q: Did this man on trial ... ever threaten you physically, threaten you with any economic sanctions with respect to any of the withdrawals made?

A: No sir, absolutely not.

Q: Did you feel ... that there was any compulsion, either physically, mentally or in any manner, to engage in the withdrawal system?

A: Would you repeat that.

Q: Were you sensible of any threat by Mr. Barber physically, mentally --

A. Never.

Q: Did he ever suggest to you that he would be receptive in any way whatsoever of any consideration flowing from you to Mr. Barber to do business in the State of West Virginia?

A: No, sir.

Q: Was he honest with you?

A: Yes, sir.

Q: Was he fair with you?

A: Very fair. [Id., pp. 1229-1230]

Testimony of Jack Asay, Heublein, Inc. and Somerset Importers:

Q: Did you feel any compulsion, that is, that you had to make your brand of spirits available to Mr. Barber?

A: No.

Q: Did you feel ... if you hadn't made it available, that Mr. Barber might have retaliated in a way to have caused you some economic or pecuniary injury?

A: No, sir. [Id., p. 1300]

Testimony of William Whelan, Schenley Affiliated Brands:

Q: Did J. Richard Barber at any time ever threaten you, directly, indirectly, your company or any other liquor representative that you know of?

A: As far as myself is concerned, he never did in any form or manner.

Q: Did Dick Barber here, the defendant tell you [authorizing withdrawals] was necessary, Mr. Whelan?

A: Mr. Barber never ever made a statement or implied anything of that nature. [Id., p. 289, 295]

Testimony of Charles Buscher, Schenley Affiliated Brands:

Q: How would it have hurt Schenley to have said we won't do it [authorize withdrawals]?

A: There is no way that I can give you a very monetary hurt of hurting Schenley, but in marketing --- ... In marketing it's pretty important for any company -- it was important for my company to have their principal brands on display or used at official functions in the State of West Virginia, and I would have damaged my company in my judgment if we had not had those brands that we advertised in view or used at official functions.

Q: What about your relationship with the Commissioner, the relationship of Schenley with Mr. Barber? ... Did you feel that you

would have been harmed in any way if you had ceased allowing this [withdrawal] practice to continue?

A: I would say no.

Q: Did Mr. Barber ever advise you, expressly, explicitly or impliedly, that if he didn't use your particular brands of liquor that you would be treated in any way differently than you were treated, than you had been treated?

A: No, sir. [Id., pp. 383-384, 394]

Testimony of George Martin, Buckingham Corporation:

Q: Did you ever feel ... during the 15 or 16 years you have been a representative of Buckingham any threat of Mr. Barber that if you didn't make Cutty Sark available for the various functions that have been described herein, or rather if you didn't make it available for Mr. Barber's discretion, you would somehow or other be punished?

A: No, sir.

Q: Did you feel any fears in that connection?

A: No, sir. [Id., p. 674]

Testimony of Martin O'Hagan, Somerset Importers:

Q: Based upon your conversations with Mr. Barber, in connection with the withdrawal system, based upon your encounters with him and what he did and didn't do, sir, would it not be fair to say Mr. Barber was trying to help you and your company in the withdrawal system?

A: I got that impression many times.

Q: And also isn't it a further fact in connection with the withdrawals, specifically with respect to the five cases of Black Label Johnnie Walker, in that connection you at no time thought that your company or you were in any jeopardy. Isn't that a fair statement to make, sir?

A: As far as Mr. Barber was concerned?

Q: Yes.

A: Yes, I think that's a fair statement.

[Id., p. 970-971]

Testimony of Gilbert Breimeister, 21 Brands

Q: Now, in your involvement with the Form 180's that they asked you about on direct examination, in any way was that Form 180 a payoff to the defendant?

A: It is not my understanding that it was.

[Id., p, 1002]

Testimony of Loretta Shaw, Hiram Walker, Inc.

Q: [referring to witness' grand jury testimony] Do you want to read that question and answer...

A: Question: "Do you think anything would have happened to you if you had attempted to stop it [authorizing withdrawals]?"

Q: And what was your answer?

A: My answer was, "I don't. I didn't think anything would happen ..." [Id., p. 1040]

2. Testimony regarding political contributions

Testimony of Robert Gilligan, Heublein, Inc.

Q: ... In any way at all did you take the $2,000 request as a quid pro quo or anything in relation to your inventory or anything like that?

A: No, sir. [Id., p. 1416]

Testimony of Charles Buscher, Schenley Affiliated Brands

Q: What was the business interest that cause dyou to meet Mr. Barber's request for these funds for a gubernatorial campaign in West Virginia?

A: Schenley Industries enjoyed a good business in the State of West Virginia and we naturally wanted our manpower and our company to maintain that relationship and the amount of business that we were personally doing in the state.

Q: How would that contribution assist in that regard?

A: The contribution in that regard, how it would assist, we would naturally assume that that would bring about the election or the re-election and the continuation of Mr. Barber as Commissioner, and as far as Schenley Industries were concerned the distribution in the stores had been very good, whereby in previous years it had not been that good, and the entire system had changed to the benefit not only of our company, Mr. Rich, but to the other companies as well.

Q: The re-election of whom?

A: That would be the existing -- the present Governor at that time, which was Governor Moore. We were more concerned about -- I was more concerned about the reappointment of Mr. Barber because of the job he had done...

Q: Did Mr. Barber with respect to the political contribution, did he by anything he said, anything he did, anything he might have written, any gesture or mannerism, convey to you any kind of threat that if you didn't make a political contribution to Governor Moore, you would suffer some kind of economic sanctions?

A: No, sir. [Id., pp. 373-374, 399]

would have been harmed in any way if you had ceased allowing this [withdrawal] practice to continue?

A: I would say no.

Q: Did Mr. Barber ever advise you, expressly, explicitly or impliedly, that if he didn't use your particular brands of liquor that you would be treated in any way differently than you were treated, than you had been treated?

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A: I got that impression many times.

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A: As far as Mr. Barber was concerned?

Q: Yes.

A: Yes, I think that's a fair statement.

[Id., p. 970-971]

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Q: Now, in your involvement with the Form 180's that they asked you about on direct examination, in any way was that Form 180 a payoff to the defendant?

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A: No, sir. [Id., pp. 373-374, 399]

APPENDIX I

Nos. 81-5176, 81-5490, 81-5495

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM AUBREY THOMPSON, THOMAS EDWARD SISK, CHARLES FREDERICK TAYLOR,
Defendants-Appellants.

APPEALS from the United States District Court for the Middle District of Tennesee.

Decided and Filed February 8, 1982.

Before: LIVELY and JONES, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. The defendants-appellants, through motions in arrest of judgment following guilty pleas, raise the issue whether the office of the Governor of the State of Tennessee may be an "enterprise" under Title IX of the Organized Crime Control Act of 1970, 84 Stat. 922 (1970). This Title, one of twelve within the Act, is commonly known by the acronym RICO, from the chapter heading "Racketeer Influenced and Corrupt Organizations." 18 U.S.C. ch. 96.

The pertinent facts are as follows. Each of the appellants was connected in the mid-to-late 1970's with the office of the Governor of Tennessee. In an indictment alleging that that office "was an 'enterprise' as defined by Title 18, United States Code, Section 1961(4)," the appellants were charged with

violating RICO by "selling" executive clemency and immunity from extradition through the governor's office.[1]

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[1] The provisions of RICO allegedly violated in this case state:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962(c)-(d). The relevant statutory definitions provide: As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

The appellants argue that Congress did not intend the application of RICO to such enterprises, or that if Congress did so intend, then RICO is unconstitutional. As will become clear from this opinion, it is unnecessary for us to reach the constitutional question posed by the appellants.

INTERPRETING RICO

A. RICO's "Plain Language."

The meaning of the term "enterprise" within RICO has been often and hotly litigated. The Supreme Court has recently laid to rest the dispute whether wholly *illegitimate* concerns can be RICO enterprises. They can. *United States* v. *Turkette*, — U.S. —, 101 S. Ct. 2524, 2527-34 (1981).

We follow the method of interpreting statutes laid down in *Turkette*. In that case, the Court looked first to the statutory definition of "enterprise." See 101 S. Ct. at 2527. The statutory definition is on its face clear and broad. "'[E]nterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals

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(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

18 U.S.C. § 1961(1)-(6).

associated in fact although not a legal entity . . . ." 18 U.S.C. § 1961(4). The Court noted that this language is unambiguous in including legitimate as well as illegitimate enterprises. The statutory language itself was therefore regarded as conclusive. See 101 S. Ct. at 2527. *Accord, United States* v. *Sutton*, 642 F.2d 1001, 1006 (6th Cir. 1980) (en banc), *cert. denied*, — U.S. — (1981). The Court in *Turkette* recognized, however, that "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language," and that in construing statutes "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." 101 S. Ct. at 2527. *See also Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Commissioner* v. *Brown*, 380 U.S. 563, 571 (1965). In short, courts in construing statutes must look beyond the statutes' words not only if the words themselves are unclear, but also if a discrete statutory provision is anomalous in effect. It is, therefore, "fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." *Richards* v. *United States*, 369 U.S. 1, 11 (1962).

Application of RICO's civil remedies to state government enterprises would result in anomalous results: district courts would not only be authorized to "prohibit any person from engaging in the same type of endeavor as the enterprise engaged in . . .," but also to order "dissolution or reorganization of *any* enterprise . . . ." 18 U.S.C. § 1964(a) (emphasis added). To hold that Congress has authorized federal district courts to dissolve or reorganize the offices of the governors of the states, and that it did so *sub silentio*,[2] is shocking and absurd.

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[2] There is no mention in RICO or in its legislative history of application to government entities.

Although the Court in *Turkette* stated that "[e]ven if one or more of the civil remedies [in RICO] might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept," 101 S. Ct. at 2530, that remark must be read in proper context. Given the patent concern with organized crime's economic power that engendered RICO's enactment, application of that statute to wholly illegitimate, as well as legitimate enterprises, was *a fortiori*. Such application yields no startling results. In these appeals we are not presented, as was the Supreme Court in *Turkette*, with cases in which various of RICO's civil remedies would be merely impracticable. Dissolution or reorganization of a governmental entity would certainly not be impracticable; the question is whether these remedies were placed within district courts' authority. If Congress may grant such authority *sub silentio*, then we have witnessed in our times the destruction of the states as sovereign political entities. *Cf. National League of Cities* v. *Usery*, 426 U.S. 833, 842-52 (1976) (Commerce Clause does not authorize Congress to force upon the states essential choices regarding conduct of integral government functions.)

B. The Legislative History of the Organized Crime Control Act.

Having decided that the application of RICO to government "enterprises" yields anomalous consequences, we proceed to examine the history of the Organized Crime Control Act to see if the legislature clearly intended these consequences. With the highest degree of certainty by which an historical "fact" can be known, it can be said that Congress did not envision the present application of RICO in passing the Organized Crime Control Act.

In arguing to the contrary, the government points out that Title IX of the Act "shall be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904, *reprinted in*

[1970] Cong. & Admin. News at 1104. This language has led some courts to what we feel to be erroneous constructions of Title IX, for to determine these "broad remedial purposes" (on which Title IX itself is silent) courts have looked to the stated purposes of the entire Act.[3] The Congressional Statement of Findings and Purpose that precedes the Act reads:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and *to subvert and corrupt our democratic processes;* (4) organized crime activitives in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, *threaten the domestic security, and undermine the general welfare of the Nation and its citizens;* and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the

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[3] This was the practice in the following cases: *United States* v. *Grzywacz*, 603 F.2d 682, 686-87 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); *United States* v. *Frumento*, 563 F.2d 1083, 1091 (3d Cir. 1977), *cert. denied sub nom. Millhouse* v. *United States*, 434 U.S. 1072 (1978); *United States* v. *Brown*, 555 F.2d 407, 415-16 (5th Cir. 1977), *cert. denied sub nom. Seymour* v. *United States*, 435 U.S. 904 (1978); *United States* v. *Barber*, 476 F. Supp. 182, 184-85 (S.D. W. Va. 1979).

> sanctions and remedies available to the Government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

84 Stat. 922-23 (emphasis added).

The emphasized phrases certainly indicate a Congressional concern over corruption of government by organized crime. *See, e.g., United States* v. *Angellili*, 660 F.2d 23, 32 (2d Cir. 1981). There is, however, no cause to equate the aims of the entire Act with those of one part of it. *See United* v. *Grzywacz*, 603 F.2d 682, 690 n. 1 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 446 U.S. 935 (1980). The Second Circuit, although holding that RICO enterprises included government entities, was obliged to note that "the congressional discussion devoted expressly to Title IX did not state that government entities were to be the beneficiaries of RICO's substantive provisions . . . ." *Angellili, supra*, 660 F.2d at 33. In other words, even though RICO is supposed to be a part of Congress's attack on organized crime's corruption of government, such corruption was never mentioned in the Congressional debate on RICO itself. Rather, corruption of government surfaced most often in the legislature's discussion of Title I of the bill, which provided for the creation of special grand juries authorized to report on the misconduct of public officers or employees. *See* 18 U.S.C. § 3333 (a)(1). The remarks of Senator Byrd concerning the two titles of the bill illustrate where the legislative concern over corruption of government was expressed in the statutory scheme:

> I am especially optimistic about title I of S. 30—the special grand jury provisions. Time and time again in

our history, aroused citizens have demonstrated their devotion to law and order in the face of official timidity and inaction. Prosecutors and judges may be scared or bought off, but citizens, properly empowered, can step in and do the job which their officials fail to do. I believe that title I represents the best opportunity for the average citizen to play a significant role in the war against organized crime.

It is encouraging that title I absolutely requires the convening of special grand juries in our major metropolitan areas at least once every 18 months and assures them sufficient longevity to probe deeply into organized crime. Perhaps this provision can overcome some of the official dilly-dallying which, I believe, is partly responsible for some of the public apathy which we have witnessed toward this problem.

These special grand juries would have the power to inquire into the violation of Federal laws and dig deeply into the activities and operations of organized crime, *including whether appropriate law enforcement officials have been properly carrying out their jobs.*

Significantly, these grand juries would be empowered to issue special reports concerning noncriminal misconduct, malfeasance, or misfeasance, by a public officer or employee as a basis for a recommendation of removal or disciplinary action.

• • • •

Another section of the bill which merits special attention, Mr. President, is title IX.

Recent studies of the phenomenon of organized crime, including that of the National Crime Commission, have identified its alarming expansion into the field of legitimate business as a major threat to our institutions. This penetration of legitimate business by organized crime poses two distinct but related dangers:

First, the economic strength of the underlying illegal operations of organized crime is perpetuated and made more profitable if tainted proceeds can be safely invested in legitimate enterprises, even if those enterprises are operated in a lawful manner.

Second, the free channels of trade are threatened by organized crime's propensity to obtain for itself monopoly control of its areas by whatever means are available, including brutal and strongarm tactics.

The techniques and methods used in such infiltration of legitimate business enterprises are many and varied. A few case histories will demonstrate how easily a business can fall captive to its awesome power.

• • • •

The legislative proposals contained in title IX of this act, entitled "Racketeer influenced and corrupt organizations," constitute a carefully structured program which can drastically curtail—and eventually eradicate—the vast expansion of organized crime's economic power which operates outside the rules of fair competition of the American marketplace. Broadly speaking, this title would create strict criminal penalties for using the proceeds of racketeering activity characteristic of organized crime to acquire an interest in businesses engaged in interstate commerce, or to acquire or operate such businesses by racketeering methods.

In addition, this title, by utilizing remedies heretofore applicable in the antitrust field—the remedies of injunction, dissolution, divestiture, and reorganization—*would forge a powerful new weapon for putting the syndicate out of business. By removing its leaders from positions of ownership, by preventing them and their associates from regaining control, and by visiting heavy economic sanctions on their predatory business practices this legislation should prove to be a mighty deterrent to any further expansion of organized crime's economic power.*

> The civil remedies of this legislation patterned after the time-tested antitrust remedies, coupled with its heavy criminal penalties, should enable the Government to take effective action to eliminate the serious threat posed to the safety and well-being of our democratic institutions by the totalitarian dictators of organized crime's closed society.

116 Cong. Rec. 606-07 (emphasis added).

Many other examples from the legislative history can be cited to show that although Congress was concerned with corruption of government by organized crime (as who is not?), RICO was aimed at organized crime's economic power. See, *e.g.*, Remarks of Sen. McClellan, 116 Cong. Rec. 591-92; Remarks of Sen. Hruska, *id.* at 602; Remarks of Sen. McClellan, *id.* at 8670; Remarks of Sen. Dole, *id.* at 36296; Remarks of Rep. Cellar, *id.* at 35196; Remarks of Rep. St. Germain, *id.* at 35200; Remarks of Sen. McClellan, 155 Cong. Rec. 9566-71 (introduction of S. 1861, predecessor of RICO's). *See also* McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?* 46 Notre Dame Law. 55, 140-42 (1970).

C. Internal Evidence of RICO's Scope.

At an earlier stage of these prosecutions, the district court (under another presiding judge) held that the enterprise element of RICO must cover government entities because two of the "racketeering activities" enumerated in § 1961 of RICO — bribery under state and federal law, and extortion under color of state law — "can only be committed in the context of governmental activity." *United States* v. *Sisk*, 476 F. Supp. 1061, 1062 (M.D. Tenn. 1979). However, under both federal and Tennessee law, bribery can be committed by those outside of government. See 18 U.S.C. § 201; T.C.A. §§ 39-801, 39-803, 39-805, 39-809, 39-812, 39-816, 39-821, 39-824. Moreover, RICO does not contain the phrase "extortion under color

of state law," but rather refers to acts indictable under the Hobbs Act, 18 U.S.C. § 1951. The Hobbs Act covers far more than extortion "under color of state law." See 18 U.S.C. § 1951(b)(2). The inclusion of bribery and Hobbs Act violations in RICO's long list of "racketeering activities" therefore does not even suggest that Congress intended "enterprises" to include government entities.

Our holding today does not mean that RICO cannot be used to reach corruption of government by organized outside forces. Nor do we suggest that public officials are immune from RICO actions. Rather, we hold that RICO's remedial provisions show that government entities are neither appropriate nor intended RICO "enterprises." *See* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Ford.L. Rev. 165, 208 (1980). Following *Turkette*, the corrupting organizations may themselves be charged as RICO enterprises, and the evils Congress feared and legislated against can be fought. *See, e.g., United States* v. *Whitehead*, 618 F.2d 523, 525 n.1 (4th Cir. 1980) (enterprise was prostitution ring protected by bribed prosecutor); *United States* v. *Herman*, 589 F.2d 1191, 1194 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979) (enterprise was bail bonding firm that bribed magistrates).[4] It would, however, be a perversion of Congress's intent to continue to allow the potent weapons created in RICO to be lifted casually against every instance of venality in state and local governments.

UNDER THE AVALANCHE, OR, THE VOYAGES OF "ENTERPRISE"

The district court, although inclined to grant the defendants' motions in arrest of judgment, was deterred by the "judicial momentum" toward classing government entities as RICO enterprises. The government refers to an "avalanche"

[4] This distinction between government and private enterprises in cases involving government officials has been overlooked by courts

of precedent adopting this rule: *United States* v. *Angelilli*, *supra*, 660 F.2d at 30-35 (2nd Cir. 1981); *United States* v. *Sutherland*, 656 F.2d 1181, 1198 (5th Cir. 1981); *United States* v. *Lee Stoller Enterprises, Inc.*, *supra*, 652 F.2d at 1316-19 (7th Cir. 1981); *United States* v. *Long*, 651 F.2d 239, 241 (4th Cir. 1981); *United States* v. *Stratton*, 649 F.2d 1066, 1074 (5th Cir. 1981); *United States* v. *Clark*, 646 F.2d 1259, 1261-67 (8th Cir. 1981); *United States* v. *Bright*, 630 F.2d 804, 829 (5th Cir. 1980); *United States* v. *Altomare*, 625 F.2d 5, 7-8 (4th Cir. 1980); *United States* v. *Karas*, 624 F.2d 500, 504 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981); *United States* v. *Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980); *United States* v. *Bacheler*, 611 F.2d 443, 450 (3d Cir. 1979); *United States* v. *Grzywacz*, *supra*, 603 F.2d at 685-87 (7th Cir. 1979); *United States* v. *Frumento*, *supra*, 563 F.2d at 1089-92 (3d Cir. 1977); *United States* v. *Brown*, *supra*, 555 F.2d at 415-16 (5th Cir. 1977); *United States* v. *Dozier*, 493 F. Supp. 554 (M.D. La. 1980); *United States* v. *Barber*, *supra*, 476 F. Supp. at 184-85 (S.D. W. Va. 1979); *United States* v. *Sisk*, *supra*, 476 F. Supp. at 1062 (M.D. Tenn. 1979); *United States* v. *Vignola*, 464 F. Supp. 1091, 1095-96 (E.D. Pa. 1979), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979); *cert. denied*, 444 U.S. 1072 (1980); *United States* v. *Salvitti*, 451 F. Supp. 195, 199 (E.D. Pa.), *aff'd mem.*, 588 F.2d 824 (3d Cir. 1978).

The sheer number of these cases is imposing, and the metaphor of an avalanche is apt, for the practice of construing "enterprise" to include government entities has truly snowballed. Many of the cases above[3] simply cite earlier precedent without further considering the enterprise issue.

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that cite *Whitehead* and *Herman* as "government-enterprise" cases. *See United States* v. *Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1318 n. 9 (7th Cir.), *cert. denied*, 50 U.S.L.W. 3440 (Dec. 1, 1981) (so citing *Herman*); *Angelilli*, *supra*, 660 F.2d at 33 (so citing *Whitehead*).

[3] *E.g.*, *Sutherland*, *Stratton*, *Altomare*, *Karas*, *Baker*, *Bacheler*, *Dozier* and *Vignola*. One of the earliest cases in the Court of Appeals that applied RICO to government entities, and one on which many of the later cases rely, is *Frumento*. On its facts, *Frumento* is argu-

More important, in most of these cases the implications of RICO's remedies were either not raised or not considered. Two exceptions to this rule are *Angellili, supra*, and *Barber, supra*. As noted above, we believe *Angellili* misapplies the Supreme Court's statement in *Turkette* that "[i]t is untenable to argue that [the existence of RICO's remedies] limits the scope of the criminal provisions." *See* 600 F.2d at 34 (quoting 101 S. Ct. at 2530). This is not, like *Turkette*, a case where certain remedial provisions are simply not feasible, but one where their application would raise grave constitutional questions. As the Supreme Court has often counseled us to do, we adopt a narrower reading of the statute in order to avoid these constitutional doubts. *See, e.g., Califano* v. *Yamasaki*, 442 U.S. 682 (1979); *Lynch* v. *Overholser*, 369 U.S. 705 (1962).

An alternative would be to follow the lead of the other court that expressly addressed the implications of RICO's remedies and hold that because these remedies are discretionary, "[t]here is no binding correlation between Title IX's remedial options and the question of whether Congress intended to exempt public entities from the meaning of enterprise." *Barber, supra*, 476 F. Supp. at 189. Yet the grant of an "unthinkable" (*id.*) remedial power cannot be ignored because its exercise is discretionary. There is an anomaly within RICO, and it must be dealt with: either RICO's definition of enterprise or its remedial provisions must be modified if each is to accommodate the other in this case.

The legislative history convinces us that it is the definition of enterprise that should yield. Congressional debates clearly indicate that what was considered important and novel in Title IX was the provision of new remedies for dealing with

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ably limited to "state operated commercial ventures engaged in interstate commerce, or other governmental agencies regulating commercial and utility operations affecting interstate commerce." 563 F.2d at 1091 (footnote omitted). It is a considerable leap from *Frumento* to apply RICO indiscriminately to every government enterprise.

organized crime. *See* Remarks of Sen. McClellan, 116 Cong. Rec. 591; Remarks of Sen. Hruska, *id.* at 602 ("[T]he principal value of this legislation may well be found to exist in its civil provisions which employ the time-tested antitrust remedies of injunction, divestiture, dissolution, and reorganization . . . ."); Remarks of Sen. Byrd, *id.* at 607. *See also* McClellan, *supra*, 46 Notre Dame Law. at 191.

It is the existence of these novel remedies that distinguishes RICO from more traditional means of attacking corruption in government (such as the Hobbs Act, 18 U.S.C. § 1951) and that renders RICO's application to a government entity inappropriate.

After the ava. nche, it is time for the spring thaw. The judgments of conviction are vacated.

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No. 81-2166

In the Supreme Court of the United States

OCTOBER TERM, 1982

J. RICHARD BARBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to show that petitioner extorted property under color of official right.
2. Whether cross-examination of petitioner was proper.
3. Whether the government properly elicited from witnesses that they or their corporations had pleaded guilty to offenses related to matters charged in petitioner's indictment.
4. Whether the trial court properly instructed the jury on the elements of mail fraud.
5. Whether the trial court properly declined to hold a hearing on petitioner's allegation of juror bias.
6. Whether a State Alcohol Beverage Control Commission is an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961(4).
7. Whether the trial court properly concluded that petitioner's immunized statements were not used in connection with his indictment and prosecution.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 668 F.2d 778. The order of the district court denying petitioner's motion to dismiss count one of the indictment (Pet. App. 33a-69a) is reported at 476 F. Supp. 182. The district court's findings and conclusions on petitioner's motion to dismiss the indictment because he had been granted immunity (Pet. App. 70a-93a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1982. A petition for rehearing was denied on March 19, 1982 (Pet. App. 109a). The petition for a writ of certiorari was filed on May 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 1), six counts of extortion, in violation of 18 U.S.C. 1951 (Counts 2-5, 19-20), and 13 counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 6-18). He was sentenced to concurrent terms of imprisonment of three years on each count. The court of appeals affirmed (Pet. App. 1a-32a).

The evidence at trial showed that from December 1971 to September 1976 petitioner used his position as Commissioner of the West Virginia Alcohol Beverage Control Commission (ABCC) to obtain free liquor for himself and numerous high state officials and to solicit and accept cash payments from certain liquor companies. The ABCC held a monopoly on alcoholic beverage sales in West Virginia. Petitioner obtained free liquor by manipulating an ABCC "withdrawal" system that permitted liquor company representatives, for business promotional purposes, to withdraw liquor from the state's warehouse and then reimburse the state for its withdrawal. Petitioner also misused a "breakage" system whereby a liquor company would absorb the loss when a shipment included damaged products (Pet. App. 3a-4a).

The withdrawal system was first developed in the early 1960's to permit liquor company representatives to withdraw samples of their product from the state inventory. The procedure required the liquor company representative, using a withdrawal form (Form 180), to request permission from the Commissioner to withdraw the desired quantity of liquor. If he approved, the Commissioner would sign Form 180, and the liquor representative would sign the document after his company had received

the liquor. The State would then bill the liquor company for the cost of the withdrawn liquor by mailing the Form 180 and a "Debit Memorandum" (Form 42). The State was then given a credit against the next shipment of liquor purchased for the State's inventory (Pet. App. 3a; I C.A. App. 299-300; II C.A. App. 774, 778-779, 821, 1018; Supp. C.A. App. 19, 22, 37-38).[1]

Petitioner, however, misused the withdrawal system. Upon receipt of requests for liquor from the governor's office, members of the state legislature, agency officials, and various social and charitable groups, petitioner would withdraw liquor from the state inventory, signing Form 180. The form was then submitted to a liquor company representative for his signature. Although the liquor company never got any liquor from the inventory when petitioner used the withdrawal system in this manner, the company would sign the form anyway, usually acknowledging both its "request" and its "receipt" of liquor. In addition, as with the legal procedure, petitioner would mail Form 180 together with a "Debit Memorandum" to the liquor company for payment. The liquor company would then reimburse the State through the credit mechanism (Pet. 9-10; Pet. App. 3a: II C.A. App. 628, 633, 846-847).

Although a few company representatives accepted petitioner's system as a promotional device (II C.A. App. 756), most expressed displeasure at this forced tribute. For example, Robert Weisenberger, a manager for James B. Beam Distilling Company, wrote the company's broker, John Sims: "We have been clobbered by the State

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[1] "C. A. App." refers to the appendix in the court of appeals. "Supp. C.A. App." refers to the government's supplemental appendix in the court of appeals.

of West Virginia, and I mean clobbered * * *. Because of these two debit memos we had to give up almost $2 per case on the total order of 2,800 cases. I fully understand the reasoning and the need of the Commission, but the extent of the situation is a sham" (I C.A. App. 375).[2] Robert McLean, a vice-president of Joseph E. Seagram & Sons, Inc., wrote numerous memos to his administrative manager, Anthony Russo, characterizing petitioner's withdrawals as "rape" (II C.A. App. 572, 574-575, 1041, 1043-1044).[3] Schenley Affiliated Brands Corporation officials discussed the legal impropriety of petitioner's withdrawals with each other and even with petitioner. In August 1974 Charles Buscher, vice-president of Schenley, wrote the West Virginia regional manager: "Vic, every time I okay one of these West Virginia debit memorandums I do so with tongue in cheek. With as much respect that I have for Dick Barber, I know that eventually these type sample withdrawals are going to get him in serious trouble" (I C.A. App. 166). On October 15, 1974,

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[2] The 30 cases of specialty decanters mentioned in the memo are the subject of Count 2, charging petitioner with extortion under color of official right (18 U.S.C. 1951).

[3] Withdrawals of Seagram's products were the subject of two mail fraud counts (Counts 6 and 7). Withdrawals of products of two Seagram divisions—Calvert Distillers Company and General Wine & Spirits Co.—were the subject of one Hobbs Act (Count 3) and two mail fraud (Counts 8 and 9) counts. The Hobbs Act count charged that petitioner extorted under color of official right 30 cases of Mattingly & Moore half-pints in April 1976 for use in the general election. These cases were ordered by Calvert's representative in response to petitioner's statement that he needed a "goodly amount" of Mattingly & Moore half-pints (I C.A. App. 537-538). In addition, the same Calvert representative testified that petitioner advised him that Calvert was subject to greater withdrawals because of the tremendous volume of Calvert's business in the State (*id.* at 544).

Buscher wrote to petitioner: "I must advise that this is not a proper method of withdrawing merchandise. * * * [W]e can't continue to allow this to be done" (*id.* at 169).[4]

Petitioner also manipulated the "breakage" system in a similar fashion. Normally, when a liquor company's shipment to the State included damaged products, the state warehouse would send an "Affidavit Concerning Damage" to the company, which would then absorb the loss (Pet. App. 4a). Petitioner used this system, however, to obtain free liquor from National Distillers & Chemical Corp. and E. & J. Gallo Winery. Petitioner set aside liquor for his own use and then sent the companies an "Affidavit Concerning Damage" falsely stating that the liquor had been damaged in shipment (I C.A. App. 15, 21, 208, 218-219; II C.A. App. 873, 877; Supp. C.A. App. 23-31, 44-46).

Petitioner further solicited and received thousands of dollars in bribes from several liquor companies. For example, petitioner asked David Robbins of the American Distilling Company to arrange for political contributions from the company. Robbins conveyed petitioner's solicitation to the president, who approved a $1000 contribution. Robbins, in turn, delivered the contribution to petitioner, in cash, in a plain white envelope.[5] Following this first cash payment, Robbins made a dozen or more $500 cash payments during various visits to petitioner in

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[4] Withdrawals of Schenley products were the subject of a Hobbs Act count (Count 4) and four mail fraud counts (Counts 10, 11, 12 and 13).

[5] At the time the payments were solicited and made, corporate political contributions were illegal in West Virginia. See W. Va. Code Ann. § 3-9-14 (Repl. 1979).

Charleston (Pet. App. 4a-5a; II C.A. App. 659-664, 666, 668-669).

On September 17, 1975, petitioner was interviewed by an FBI agent concerning his knowledge of campaign financing during the 1972 gubernatorial election. The agent prepared a summary of the interview on an FBI "302" form. In December 1975 petitioner testified before a grand jury investigating Governor Arch A. Moore. Immediately before his testimony petitioner was interviewed by FBI agents, who then prepared another interview report (Pet. App. 5a).

On June 26, 1979, almost two months after the return of the indictment, petitioner asserted that he had been granted immunity in December 1975 by the former United States Attorney in return for his testimony before the grand jury; he contended that the indictment should be dismissed because it was derived from this immunized testimony. Following the filing of petitioner's motion, the United States Attorney located the transcript of petitioner's December 1975 grand jury testimony. This was the first time anyone connected with the investigation leading to petitioner's indictment had seen petitioner's 1975 testimony (Pet. App. 91a-92a; III C.A. App. 1201-1202). The lead FBI case agent in the liquor investigation, however, did have a copy of the December 1975 interview report as early as May 5, 1978, and had disseminated copies to other agents and to the United States Attorney's office in the early stages of the liquor investigation (III C.A. App. 1202-1203, 1352).

After hearings on the question of immunity, the trial court found that the United States Attorney had implicitly assured petitioner that his responses to questions in the September and December 1975 interviews and the December 1975 grand jury hearing "would not be used against him either directly or through leads gained there-

from" (Pet. App. 10a, 73a). After hearing testimony from individuals in the United States Attorney's Office, the Bureau of Alcohol, Tobacco, and Firearms, and the FBI, however, the court concluded that no part of the government's case nor any evidence utilized in the indictment and preparation for trial had stemmed from the 1975 interviews or from petitioner's grand jury testimony.[6] All evidence used by the government was derived from wholly independent sources (Pet. App. 92a). In addition, the court determined that "neither the subject matter of the investigation nor [petitioner's] involvement therein was in any manner * * * focused upon by virtue of the immunized statements and testimony or the fruits thereof, but was similarly the result of evidence obtained from legitimate and wholly independent sources" (Pet. App. 92a-93a).

ARGUMENT

1. Petitioner contends that the evidence was insufficient to show that he extorted property under color of official right (Pet. 32-42). He urges that the court of appeals was incorrect in concluding that once the government showed that the liquor companies gave him free liquor, extortion could be presumed unless petitioner produced a "convincing explanation." Petitioner contends that this "presumption" improperly shifts the burden of proof. Petitioner's argument, however, misconstrues the court's opinion. The court correctly held that the evidence

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[6] The FBI form 302 dealt with a brief period from July 1972 to November 1972 and related only to petitioner's campaign fund-raising activities. Hence, the report did not touch on petitioner's extraction of free liquor or on his receipt of monies after November 1972 (see III C.A. App. 1352-1353).

was sufficient to show that the companies' motivation for authorizing the withdrawals focused on petitioner's public office, and that the payments were thus not given voluntarily.

As the court of appeals noted (Pet. App. 12a-13a, quoting *United States* v. *Hedman*, 630 F.2d 1184, 1194-1195 n.4 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981)), the provision "under color of official right" does not

> "require proof of specific acts by the public officials demonstrating force, threats, or the use of fear so long as the victim consented [to the provision of a benefit] because of the office or position held by the official who obtained the money.
>
> If the public official knows the motivation of the victim focuses on the public official's office and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, that is sufficient to satisfy the requirements of the law of extortion under color of official right.
>
> The mere voluntary payment of money would not constitute extortion."

Hence an outward expression of compulsion or inducement, an articulated *quid pro quo*, is not required. The courts of appeals have consistently so held. See *United States* v. *French*, 628 F.2d 1069, 1071-1075 (8th Cir. 1980), cert. denied, 449 U.S. 956 (1980); *United States* v. *Grande*, 620 F.2d 1026, 1031 (4th Cir. 1980); *United States* v. *Butler*, 618 F.2d 411, 417-420 (6th Cir.), cert. denied, 447 U.S. 927 (1980); *United States* v. *Cerilli*, 603 F.2d 415, 425-426 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Phillips*, 577 F.2d 495, 503 (9th Cir.), cert. denied, 439 U.S. 831 (1978); *United States* v. *Hall*, 536 F.2d 313, 321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Hathaway*, 534 F.2d 386, 393 (1st Cir.), cert. denied, 429 U.S. 819 (1976);

United States v. *Trotta*, 525 F.2d 1096, 1098-1099 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976).

In the instant case, the evidence showed that because of petitioner's misuse of his office, the liquor companies were induced to give free liquor. See *United States* v. *Hathaway*, *supra*, 534 F.2d at 393; *United States* v. *Mazzei*, 521 F.2d 639, 644-645 (3d Cir.), cert. denied, 423 U.S. 1014 (1975). Even though there was little testimony from liquor company representatives about why they gave free liquor, "[i]t is inescapable that the authorization would not have been given had not [petitioner] been Commissioner" (Pet. App. 15a). Moreover, the evidence showed that the liquor companies which gave free liquor did in fact feel compelled to do so. The James Beam representative complained that the company had been "clobbered" by the State; a vice-president of Seagram & Sons, Inc., characterized the petitioner's withdrawal of free liquor as "rape." Petitioner manipulated the withdrawal system by first taking the liquor himself, then getting the companies to sign a form stating that the liquor had been for their own use. As the court of appeals noted, "[r]atification of a *fait accompli* is far less likely [than an act initiated by the donor] to reflect a donative intent" (Pet. App. 16a-17a). Thus, the evidence was sufficient for the jury to infer that the motivation for the payments was petitioner's office, not charity.[7]

2. Petitioner next contends (Pet. 42-46) that the prosecutor improperly cross-examined him about his refusal

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[7] Hence the court of appeals' observation (Pet. App. 16a) that petitioner offered no "convincing explanation" does not represent a shift in the burden of proof. The government's affirmative evidence was sufficient to show that petitioner extorted the liquor payments "under color of official right" and that the liquor companies did not give free liquor out of friendship for the petitioner. The fact that

to testify before the grand jury. The court of appeals correctly held, however, that in his previous answers petitioner had "opened the door" to questioning about his failure to appear before the grand jury (Pet. App. 24a).

During cross-examination, petitioner suggested that the government had not provided him with an opportunity to explain his position on the subject of his indictment. At that point, the United States Attorney advised the court and petitioner's counsel that petitioner's answer had opened the door to impeachment concerning his refusal to testify before the grand jury. The court then offered petitioner an opportunity to retract or amend his statement. When he declined to do so, the United States Attorney asked petitioner whether it was not true that he had refused to testify before the grand jury that was investigating the liquor withdrawal system (II C.A. App. 861-864).

This line of questioning was entirely proper. Unlike *Doyle* v. *Ohio*, 426 U.S. 610 (1976), in which the prosecution sought to impeach a defendant's explanation by referring to his post-arrest silence, here the government sought to impeach petitioner's denial that he had even been asked any questions by the government. Cf. *United*

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petitioner offered no "convincing explanation" merely made it all the more reasonable for the jury to draw those conclusions.

The theory that petitioner incorrectly attributes to the court of appeals clearly was not offered to the jury as an acceptable basis for conviction. The trial judge instructed the jury that "neither the mere voluntary payment of money, including political contributions whether solicited or not, nor the delivery of property, unaccompanied by any reasonable fear of economic loss, constitutes extortion, unless the payment or delivery was made under some form of compulsion or inducement by virtue of the defendant's office * * *" (Pet. 22 n.6).

States v. *Dixon*, 593 F.2d 626, 630 (5th Cir.), cert. denied, 444 U.S. 861 (1979). Indeed, petitioner effectively consented to questioning on this subject. The trial court advised him of the government's impeachment evidence and gave him a chance to amend his answer before the government could mention his failure to testify to the grand jury.[8]

3. Petitioner contends (Pet. 46-48) that the trial court improperly permitted the government to introduce evidence of his co-participants' guilty pleas. This contention is without merit. The district court properly allowed five witnesses to testify about guilty pleas not as substantive evidence of petitioner's guilt, but rather as proper subjects for impeachment.

On cross-examination of five government witnesses, petitioner elicited testimony that his activities had not "harmed" them or their companies. Accordingly, the trial court allowed the government to impeach the witnesses on redirect examination by asking whether they, or the corporations for which they worked, had been "harmed" by pleading guilty (see, *e.g.*, I C.A. App. 249, 314-318, 322). This questioning was proper. Petitioner had invited testimony concerning guilty pleas by raising the question

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[8] Petitioner's reliance on *Grunewald* v. *United States*, 353 U.S. 391 (1957), is inapposite. In *Grunewald* the prosecutor sought to impeach a defendant's answers to certain questions by cross-examination which revealed that the defendant had claimed his Fifth Amendment privilege on the very same questions before the grand jury. This line of questioning was improper because the defendant's plea of the Fifth Amendment was not inconsistent with his later testimony at trial. *Id.* at 423. Here, by contrast, the government asked not the same questions but whether petitioner had ever been asked *any* questions. In this context, the fact that petitioner had refused to appear before the grand jury was inconsistent with his protestation of constant willingness to cooperate.

of harm. Hence the government properly impeached the witnesses' credibility on this issue by inquiring into the various guilty pleas. See *United States* v. *Binger*, 469 F.2d 275, 276 (9th Cir. 1972).[9]

4. Petitioner next contends (Pet. 48-51) that the trial court erred in its instruction on mail fraud, because it failed to define for the jury what was meant by defrauding "the State of West Virginia and its citizens of the honest and faithful performance of [his] duties as Alcohol Beverage Control Commissioner * * *" (see II C.A. App. 952). Petitioner's point seems to be that the charge permitted the jury to convict him without any showing that the scheme in which he participated influenced his judgment or decisions on official matters. This claim is frivolous. The court of appeals correctly concluded that the charge "clearly and unambiguously spelled out, in a fashion readily understandable, a correct statement of the law" (Pet. App. 18a; see II C.A. App. 950-955, 961-962). Moreover, the evidence as to petitioner's actions afforded the jury ample basis for deciding that his handling of official matters was indeed influenced. Petitioner had no more "official" function than to maintain honest control of the State's liquor inventory. In violation of that duty he appropriated large amounts of free liquor and falsified documents concerning withdrawals and "breakage." It is difficult to imagine a clearer breach of the duty of honest and faithful performance owed by petitioner to the citizens of West Virginia. See Pet. App. 18a n.4; *United*

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[9] Petitioner's reference (Pet. 47) to cases saying that co-participants' guilty pleas may not be used to prove a defendant's guilt are accordingly inapposite. In petitioner's case the pleas were utilized by the government to impeach witnesses, not as substantive evidence of guilt.

States v. *Pintar*, 630 F.2d 1270, 1279-1281 (8th Cir. 1980); *United States* v. *Brown*, 540 F.2d 364, 374-375 (8th Cir. 1976). [10]

5. Petitioner also argues (Pet. 51-52) that he was entitled to an evidentiary hearing to determine whether Beulah James, one of the jurors, was biased. The opinion of the court of appeals, on which we rely, adequately disposes of this contention (Pet. App. 30a-32a). [11]

6. Petitioner next argues (Pet. 53-55) that a public entity such as the West Virginia Alcohol Beverage Control Commission is not an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961(4), and claims that the district court's conclusion (Pet. App. 33a-69a) conflicts with the Sixth Circuit's opinion in *United States* v. *Thompson*, 669 F.2d 1143 (1982), vacated and rehearing granted (Mar. 26, 1982), which held that a government entity cannot be an "enterprise." In view of the vacation of the panel opinion in *Thompson* and the unanimity of the

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[10] In *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), relied upon by petitioner (Pet. 49-51), the defendant, a state representative, collected a fee for introducing an architectural firm to individuals in other branches of state and city government who had control over the awarding of architectural contracts. The court of appeals refused to sustain his conviction, expressing doubts about the conviction of a state official for "a showing of dishonesty on [his] part * * *, outside his official duties * * *." 583 F.2d at 1024. The court noted, however, that "[t]he concept of fraud upon the public may clearly fall within the ambit of the mail fraud statute where dishonest conduct by a public official directly implicates the functions and duties of that official's public office" *(ibid.)*.

[11] *Smith* v. *Phillips*, No. 80-1082 (Jan. 25, 1982), though it held that a hearing may be sufficient to dispel the possibility of bias, plainly does not require that a hearing be held whenever an allegation of bias is made.

other courts of appeals on the issue, there is no current conflict among the circuits requiring the consideration of this Court.

In any event this Court, in *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), held that RICO's definition of "enterprise" imposes "no restriction upon the associations embraced by [it]" and includes all entities within its literal scope.[12] Consistent with this interpretation, six courts of appeals have held that public entities like the West Virginia ABCC may be "enterprises" within the meaning of the Act. *United States* v. *Angelilli*, 660 F.2d 23, 31 (2d Cir. 1981) (New York City Civil Court); *United States* v. *Dean*, 647 F.2d 779, 791 (8th Cir. 1981) (office of county judge), rev'd on other grounds, 667 F.2d 729 (8th Cir. 1982) (en banc); *United States* v. *Karas*, 624 F.2d 500, 504 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981) (county law enforcement officials); *United States* v. *Bacheler*, 611 F.2d 443, 450 (3d Cir. 1979) (traffic court); *United States* v. *Grzywacz*, 603 F.2d 682, 686 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980) (city police department); *United States* v. *Frumento*, 563 F.2d 1083, 1089-1092 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978) (Pennsylvania Bureau of Cigarette and Beverage Taxes); *United States* v. *Brown*, 555 F.2d 407, 415-416 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978) (city police department). There is thus no reason to consider petitioner's contention that the ABCC is not a RICO "enterprise."

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[12] Section 1961(4) of RICO defines an "enterprise" as:

> * * * any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]

7. Petitioner finally asserts (Pet. 55-57) that the government made improper use of his immunized testimony. This fact-bound claim was properly rejected by both courts below and does not warrant further review by this Court.

As the court of appeals observed (Pet. App. 7a-8a), even if the government had wrongly used the FBI 302 forms, the information they contained would have been of no use to the liquor withdrawal investigation. The forms contained petitioner's admission that he had collected between $50,000 and $70,000 in cash from liquor salesmen, employees of State Alcohol Beverage Control Stores and other individuals, and had delivered the money to the Governor of West Virginia for use in the 1972 gubernatorial campaign (III C.A. App. 1525-1530). This information in no way relates to 15 of the 20 counts in the indictment (Counts 3-11, 14-18, 20), which charged unrelated criminal activities after December 11, 1975, when petitioner testified before the grand jury (see I C.A. App. 32-53). Indeed, the only overlap between the Form 302 information and the indictment is limited to two of the 44 acts of racketeering alleged, which related to petitioner's collection of cash from two liquor companies during the 1972 gubernatorial campaign (I C.A. App. 21-22, 30).[13]

In any event, the government satisfactorily demonstrated that before it became aware of the forms it had

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[13] Twelve of the racketeering acts alleged concerned payments of money before the 1972 election (6u-6w, 6aa-6hh, 6rr; see I C.A. App. 21-22, 24-27, 30). Two were stricken by the trial court as legally insufficient (6w, 6rr). Eight others (6aa-6hh) were not related to the election, but were instead part of a systematic scheme of $1000, and then $500, payments made by American Distilling Company to petitioner from 1971 through 1975 (II C.A. App. 659-664, 666, 668-669).

already learned of their subject matter, and that it did not use the forms in connection with petitioner's case. This conclusion was arrived at by the trial court after pretrial hearings at which the court thoroughly inquired into the origin and progression of the liquor investigation (Pet. App. 80a-93a). Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1981

NO. 81-2166

J. RICHARD BARBER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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1. The government attempts to avoid the Hobbs Act presumption created by the Court of Appeals in this case, by arguing that the prosecution affirmatively proved that the liquor companies participated in the withdrawal system because of a reasonable feeling of compulsion. The government's brief (at 3) states that

"[a]lthough a few company representatives accepted petitioner's system as a promotional device, most expressed displeasure at this forced tribute." The Court of Appeals reached the opposite conclusion, however, and acknowledged that "a majority of the companies considered the withdrawal practice to be a valid 'promotional' device [although] some company officials resented the defendant's excessive withdrawals" (Pet. App. 21a).

The Court of Appeals' opinion does not even purport to be based on affirmative evidence of compulsion. The Fourth Circuit's affirmance of the Hobbs Act and RICO convictions[1] is based upon

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[1] Seventeen bribery charges, supported solely by the bizarre testimony of David Robbins which is recounted by the government in its brief, constituted the only non-extortion charges underlying the RICO count. In response to petitioner's challenge to the sufficiency of this evidence to establish bribery, the Court of Appeals simply ignored the charges, and affirmed the RICO conviction based upon the extortion charges alone (Pet. App. 23a). It is quite possible that the jury did likewise, since Robbins' credibility was highly questionable and the extortion

(footnote continued)

only two facts in the record -- that petitioner held public office and that he received property from companies doing business in the state. These facts, according to the Court's unequivocal language, are sufficient to establish extortion "absent a convincing explanation" by the defendant: "No such convincing explanation has been forthcoming here. Its absence provides an adequate basis for an inference that ... there was nothing voluntary about the withdrawals" (Pet.App. 16a)(emphasis added).

The government's contention also is unsupported by the actual evidence in the case: out of a 1747 page trial transcript, involving twenty-six alleged acts of extortion with twenty separate companies as "victims",[2] the government has found

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charges alone were sufficient to establish the RICO predicate crimes.

[2] Twenty-two of these charges, involving sixteen separate companies, were submitted to the jury. Six of the charges formed
(footnote continued)

testimony by three witnesses who "expressed displeasure" with the withdrawal system. These witnesses' testimony relates to only two of the six substantive Hobbs Act charges, and fails to adequately support even those two.

The government's first find, Robert McLean, whose memos to a colleague characterized some withdrawals as "rape", was vice-president of Joseph E. Seagram & Sons, the parent company of Calvert Distillers, the "victim" of Count 3. However, the "rape" memos quoted by the government related solely to withdrawals from a separate corporate entity, Seagrams Distillers, which were not the subject of any of the substantive Hobbs Act charges.[3]

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the substantive Hobbs Act counts; the remainder served as predicates for the RICO count.

[3] These withdrawals, along with those from other Seagrams subsidiaries, were charged together as one predicate crime of extortion in the RICO count of the indictment.

The Seagrams Distillers withdrawals had been authorized by the company's West Virginia state manager, Joseph Prino (C.A. (footnote continued)

The Calvert Distillers' withdrawals which were charged in Count 3 had been authorized by Calvert's West Virginia state manager, John Saladini. Saladini specifically denied that petitioner had "at any time ... expressly or impliedly" asked for authorizations for liquor withdrawals or exacted any tribute as a cost of doing business in the State (C.A. App. 546). Furthermore, Saladini stated that, when petitioner assumed office, Salidini had gone to him and voluntarily given him express and unlimited authority to withdraw Calvert products[4] (Id.).

App. 752). Prino and McLean disagreed strongly regarding the use of the withdrawal system as a promotional device (C.A. App. 756). Despite McLean's disagreement, Prino felt that the system was "a real good vehicle" for promotion (C.A. App. 759) and gave petitioner "general authority" to make withdrawals (C.A. App. 757). Prino testified that, in authorizing the withdrawals, "I never ever felt that I was paying the commissioner. I used that as a tool to get the product in the hands of the prospective consumer" (C.A. App. 769).

[4] In view of the district court's instructions to the jury in this case -- that the Hobbs Act charges required proof

(footnote continued)

The government's second discovery, Robert Weisenberger, was control states manager for the James Beam company during most of petitioner's tenure in office. Beam conducted its business in West Virginia solely through a broker, John Sims. Sims regularly signed withdrawal forms sent to him by petitioner's office, and then forwarded the signed forms to Weisenberger together with a cover letter stating that the liquor and been "withdrawn from the warehouse by the Commissioner" and requesting that its cost be credited to the state's account (C.A.App. 362-65). Weisenberger testified that he did not object to most of petitioner's withdrawals, "for entertaining purposes [or] whatever they might have been", and that his objection to the particular withdrawal charged in

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that petitioner was "the initiator or inducer of the obtaining of the money or property" (C.A. App. 950) -- Saladini's uncontradicted testimony actually negates an essential element of this charge.

Count 2 was "because this was something out of the norm ... it was too much" (C.A. App. 373, 376). Weisenberger testified that when he objected to Sims about this withdrawal, Sims personally paid for the withdrawn merchandise. (C.A. App. 377-78, 388). There was no evidence whatsoever that either Sims, who had died prior to trial, or Weisenberger felt any compulsion to authorize any withdrawal.

Finally, the government seizes upon the testimony of Charles Buscher, who was vice-president of Schenley Affiliated Brands, the "victim" of the Hobbs Act violation charged in Count 4 of the indictment. Despite his prophecy, quoted in the government's brief, that the "sample withdrawals are going to get [petitioner] in serious trouble" -- a statement based solely upon his belief that the particular method used for withdrawals might violate Internal Revenue Service regulations (C.A. App. 166, 174) -- Buscher emphasized that he never

thought that the withdrawal system might constitute a criminal violation (C.A. App. 168, 171). More importantly, he unequivocally stated that petitioner never advised him "expressly, explicitly or impliedly" that a refusal to authorize withdrawals might result in official sanctions, and that he did not believe that his company's relationship with petitioner would have been harmed "in any way" if he had refused to participate in the withdrawal system (Pet. App. 116a-117a). The only harmful result Buscher feared from non-participation was the loss of the system's promotional value for his company's products (Id.).

Buscher was also the government's only witness regarding a RICO predicate crime based upon petitioner's alleged extortion of a campaign contribution. His testimony with respect to this charge also negates any possible inference of compulsion:

> Q: What was the business interest that caused you to meet

Mr. Barber's request for these funds for a gubernatorial campaign in West Virginia?

A: Schenley Industries enjoyed a good business in the State of West Virginia and we naturally wanted our manpower and our company to maintain that relationship and the amount of business that we were personally doing in the state.

Q: How would that contribution assist in that regard?

A: The contribution in that regard, how it would assist, we would naturally assume that that would bring about the election or the re-election and the continuation of Mr. Barber as Commissioner, and as far as Schenley Industries were concerned ... the entire system had changed to the benefit not only of our company ... but to the other companies as well.

Q: The re-election of whom?

A: That would be the existing -- the present Governor at that time, which was Governor Moore... I was more concerned about the reappointment of Mr. Barber because of the job he had done...

Q: Did Mr. Barber with respect to the political contribution, did he by anything he said, anything he did, anything he might have written, any gesture or mannerism, convey to you any kind of threat that if you didn't make a political contribution to Governor Moore,

you would suffer some kind of economic sanctions?

A: No, sir (Pet. App. 121a-122a).

With respect to the other three substantive Hobbs Act counts of the indictment, the evidence of compulsion was simply non-existent. Two of these charges (Counts 19 and 20) were based upon withdrawals charged to the manufacturers, National Distillers and Gallo Winery, through affidavits normally used for damaged merchandise. The only witnesses who testified about these charges, the ABCC warehouse supervisor and the petitioner, stated that representatives of both companies had suggested that this method be used for withdrawals of their products. No company representatives appeared as witnesses regarding these charges, and there was simply no evidence that their participation in the system was anything but voluntary. The final Hobbs Act count (Count 5) was based upon withdrawals of Heublein's Smirnoff Sales

Company, which were authorized by Jack Asay, Smirnoff's state representative. Asay testified that when petitioner first assumed office, Asay authorized him to make withdrawals of Smirnoff products and assured him that the company would approve them[5] (C.A.App. 649-50). Asay unequivocally stated that he felt no sense of compulsion to permit withdrawals, and had no fear that a refusal to do so would result in retaliation. (Pet. App. 115a).

In summary, the government's attempt to avoid the Fourth Circuit's reasoning, by claiming that the government's affirmative evidence would support a finding of compulsion, has no basis in the record of this case or in the opinion of the Court of Appeals.

2. The government contends that, before permitting the extensive questioning of petitioner regarding his

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[5] The testimony as to this count, as well as to Count 3, negated the charge that petitioner had initiated the alleged extortion. See n.3, supra.

failure to appear before the grand jury which indicted him, the district court offered him an opportunity to "amend" his previous testimony. The record shows otherwise. The only option permitted by the district court was a flat retraction by petitioner of his sworn testimony (C.A. App. 862-63). Petitioner properly rejected this draconian alternative on the grounds that his testimony -- that he had never denied the existence or extent of the withdrawal system -- was not inconsistent with his refusal to assist the government by appearing before a grand jury after his indictment had become a fait accompli.

There are really only two inconsistencies in this case. The first is between the opinion of the Fourth Circuit and this Court's opinion in Grunewald v. United States, 353 U.S. 391 (1957). The second is between the Fourth Circuit's opinion and those of the other Courts of Appeals which recognize that,

even where a defendant might be properly impeached by testimony regarding his assertion of his Fifth Amendment rights, the enormously prejudicial effect of such testimony must be carefully balanced against its probative value. The minimal probative value of the repeated questioning permitted in this case was clearly outweighed by its prejudice to petitioner.

3. The government argues that petitioner "invited testimony concerning guilty pleas [by the liquor companies participating in the withdrawal system] by raising the question of harm" and that evidence of the pleas was properly admitted for impeachment purposes. However, the indictment itself "raised the question of harm", charging that the withdrawal system constituted a scheme to defraud the companies and their shareholders "of the revenue and profit owing and due them" (C.A. App. 36), and the government attempted to establish such

economic harm in its case in chief. In order to negate an essential element of the government's case -- a "showing that some actual harm or injury was contemplated by the schemer", United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970) -- the defense attempted to show that the withdrawals were part of a promotional system which was intended to, and did, benefit both the companies and the state. This questioning by the defense cannot be held to have "opened the door" to the irrelevant and prejudicial evidence of the companies' criminal convictions.

The prosecution theory in this case, both at trial and on appeal, was that the companies were harmed by the convictions resulting from their participation in the withdrawal system, and that this "harm" could justify petitioner's convictions for mail fraud.[6] The Court of Appeals clearly

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[6] The jury was never instructed that the evidence of the company guilty pleas was (footnote continued)

upheld this theory (Pet. App. 21a-22a). The government's attempt to characterize the pleas as mere impeachment evidence[7]

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for impeachment purposes only, and the government's argument throughout the case affirmatively invited the jury to consider the pleas as substantive evidence that petitioner had harmed -- and therefore defrauded -- the companies.

Even if the jury had been instructed to consider the company convictions only for their impeachment value, the admission of the convictions into evidence would have been severely prejudial. Contrary to the suggestion in the government's brief (p.12, n.9), the decisions of the Fifth and Nineth Circuits which are cited in the Petition condemn the introduction of such evidence even for the limited purpose of impeachment, recognizing the unlikelihood of the jury performing mental gymnastics with such inherently prejudical evidence.

[7] Even accepting the government's theory that the convictions proved that the companies had been harmed by petitioner's use of the withdrawal system, most of the witnesses' testimony was not inconsistent with this fact, and therefore did not provide a proper predicate for introduction of the pleas as impeachment evidence. Of the five company representatives whom the government sought to "impeach" through their companies' pleas, only two, Gilbert Breimeister and Elvis Kington, had stated without qualification that their companies had not been harmed by the withdrawal system. William Conover testified that his company had not suffered, but explicitly limited his answer to the period during which the system was in operation. Blaine Peterson

(footnote continued)

cannot change the fact that petitioner was convicted of mail fraud -- and the conviction was affirmed -- at least in part on the theory that he had harmed the companies by causing their criminal convictions. Indeed, the convictions would not even be relevant for impeachment purposes unless they constituted legitimate evidence that the companies had been "harmed" by the withdrawal system. In this case, where the primary issue was the intended and actual effect of the withdrawal system, the evidence of the companies' criminal punishment for participating in the system was devastating.

4. The government argues that the West Virginia Alcohol Beverage Control

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testified only that he had never objected to the withdrawal system when it was operated by petitioner, and that he did not consider the system to be immoral. John Saladini simply stated that he did not believe that petitioner's activities in office had harmed the citizens of the state of West Virginia. The relevant testimony of these witnesses is reprinted as a supplemental appendix attached to this brief.

Commission may be an "enterprise" under the RICO statute, based upon this Court's opinion in United States v. Turkette, 452 U.S. 576 (1981). But the government ignores Turkette's clear statement that "the existence of an enterprise at all times remains a separate element which must be proved by the government," Id. at 583. The government likewise ignores the fact that, in this case, the district court instructed the jury as a matter of law that the ABCC was an "enterprise", and thereby relieved the government of the burden of proving a fact which is, under Turkette, an essential element of the offense.

5. The government suggests that "even if the government had wrongly used" petitioner's prior immunized testimony, the error would be harmless in view of the number of charges in the indictment which were unrelated to the subject matter of the testimony. However, the Fifth Amendment is violated when the government

uses immunized testimony "in any way," Kastigar v. United States, 406 U.S. 441 (1972), even for purposes of impeachment, New Jersey v. Portash, 440 U.S. 450 (1978). Petitioner's trial was contaminated by the introduction of massive amounts of evidence about his collection of political contributions -- the subject of his immunized testimony -- and such a basic constitutional violation cannot be cured in the facile manner suggested by the government.

The government also urges this Court to ignore petitioner's claim that his prosecution was tainted by use of his immunized statements, on the grounds that such a claim is "fact-bound". However, "testimony given in response to a grant of immunity is the essence of coerced testimony" and involves the Fifth Amendment privilege "in its most pristine form." New Jersey v. Portash, 440 U.S. 450, 459 (1978). And this Court has recognized that its "duty is not limited

to the elaboration of constitutional principles; [the Court] must also in proper cases review the evidence to make certain that those principles have been constitutionally applied," New York Times v. Sullivan, 376 U.S. 254 (1964). Petitioner's prosecution by the same jurisdiction which had granted him immunity -- and the government's admitted possession of, and extraordinary interest in, his prior immunized statements -- presents a proper case for this Court to reveiw the evidence to make certain that critical constitutional principles have been correctly applied.

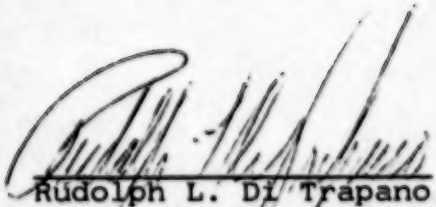
6. The government's brief (at I) states that "the trial court properly declined to hold a hearing on petitioner's allegation of juror bias." In fact, the trial court never had an opportunity to rule on this issue since the government, throughout the trial, withheld the information on which the bias allegation was based. Under these circumstances,

petitioner simply had no means of establishing any more than, in the words of the Court of Appeals, "a potentially suspicious circumstance [and] unverified conjecture" (Pet.App. 31a). The Court of Appeals' ruling provides the government with a powerful incentive to withhold throughout trial any information which casts doubts on a juror's impartiality, by absolutely insulating from challenge any resulting conviction. According to the reasoning of this Court in Smith v. Phillips, 102 S.Ct. 940 (1982) and traditional due process principles, petitioner at least should have been permitted to develop a record in support of his claim, and the trial court should have been given an opportunity to rule on the issue.

Conclusion

For the reasons stated above, petitoner asks this Court to grant his petition for a writ of certiorari.

J. RICHARD BARBER
BY COUNSEL



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SUPPLEMENTAL APPENDIX

Questioning Regarding the Company Guilty Pleas

John Saladini:

By petitioner (C.A.App. 549):

Q: Mr. Saladini, you're a government witness and you're also a salesman and were the state manager in the State of West Virginia for Calvert, and you're also a citizen of the state of West Virginia. As a citizen of the State of West Virginia, do you feel you were injured by the practices of this man on trial today?

A: No.

Q: As a matter of fact, he was the very best Commissioner, public servant, in that office this state has ever had. Isn't that true?

A: It is true.

By the government (C.A.App. 549):

Q: You weren't injured, but your company suffered as a result of your activities

signing those withdrawal forms that Mr. Barber received the merchandise, isn't that correct?

A: Well, what do you mean by injured?

Q: They pled guilty and were convicted in this court and fined.

Gilbert Breimeister:

By petitioner (C.A.App. 461):

Q: As a stockholder in Formost McKesson [parent company of 21 Brands], did those withdrawals on that Form 180 affect your corporation or affect you as a stockholder in any fashion?

A: Not to my knowledge.

By the government (C.A.App. 474-76):

Q: Are you aware, Mr. Breimeister, and I am referring specifically to your statements that your company wasn't adversely affected by these withdrawals -- are you aware of the fact that your company has been convicted in this court in connection with federal crimes relating to these withdrawals?

* * *

A: I am aware of the fact that 21 Brands, my company, was a defendant in a case before this court. Precisely what the conclusion was has never been carefully explained to me.

Q: How about generally?

A: Generally, yes.

Q: Do you generally know that 21 Brands was convicted in this court in December of 1978 for federal crimes relating to transactions on these Form 180's such as are before you, Mr. Breimeister?

A: I am aware of the fact that there were a number of misdemeanors that 21 Brands pled guilty to. If that is considered a conviction, yes, I am aware of that.

* * *

Q: Are you aware of the fact that 21 Brands was fined $10,000 by this court in coneection with its activities relating to these withdrawal forms?

A: I never heard the price.

William Conover:

By petitioner (C.A.App. 284-85):

Q: Did your company suffer in some fashion by this Form 180? How did your company suffer?

A: The company really didn't suffer. Our business over a period of years remained rather static.

Q: So it's a fair statement to say that your company did not suffer in any fashion. Isn't that a correct statement?

A: During this period, yes. You are not talking about my having to turn in my license or be penalized or something?

Q: No...

By the government (C.A.App. 286-87):

Q: You said your company did not suffer from this program. It's a fact your company pled guilty. Isn't that correct?

A: Yes, sir.

Elvis Kington:

By petitioner (C.A.App. 313):

Q: Do you know of anything that those

Form 180's did to hurt the people of the State of West Virginia? Do you know of something that those transactions you have just testified to there did to hurt the citizens of this state?

A: No.

Q: Those transactions also did not hurt your company, did they?

A: We considered it just a part of doing business. It was such a minor thing. We did not consider it a big expense at all.

Q: It didn't hurt your company, did it, Mr. Kington?

A: I would say not.

Q: In fact, you felt those 180's were something of a promotional vein. Isn't that a fair statement?

A: Well, to a certain extent it was putting our brands before the public, if you were going to take it in that category, yes.

By the government (C.A.App. 322):

Q: You have stated in response to a question from Mr. Barber that your actions

in signing those forms indicating you had done something that you had not did not hurt your company. Do you remember saying that?

A: Well, I didn't consider it hurting us because it was such a small amount.

Q: But the fact of the matter is, is it not, Mr. Kington, that because of your signing those statements providing that false information that your company had to walk into this court and plead guilty to federal crimes, isn't that correct?

A: Yes, sir.

Blaine Peterson:

By petitioner (C.A.App. 247):

Q: ... Did you ever come down and have a meeting with Mr. Barber and tell him stop this withdrawal system, this 180 system? Did you ever do that?

A: No, sir, I did not.

Q: You had no objections to it really, did you?

A: No.

* * *

Q: You didn't think anything wrong about it did you?

A: No, I didn't.

Q: You still don't, do you?

A: I know now that it's illegal.

Q: I mean wrong morally. A lot of things in this world that become illegal, but do you feel it's immoral, what you did all this time, all these years?

A: No.

By the government (C.A.App. 249):

Q: When you say you learned it was illegal and you don't consider it immoral, you see nothing immoral in signing documents that state one thing that isn't true?

A: Well, that would be immoral, yes.

* * *

Q: As a matter of fact, you learned it was illegal when you pled guilty to what you had done down here.

A: That's right.

CERTIFICATE OF SERVICE

I, Rudolph L. Di Trapano, counsel of record for petitioner, hereby certify that three copies of the enclosed "Petitioner's Reply to the Brief for the United States in Opposition" were served on the United States by depositing the same in the United States Mail, postage prepaid, addressed to the Solicitor General, Washinton, D.C., on this the 25th day of August, 1982.

Rudolph L. Di Trapano